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## On An Alternative To A Punitive State In Response To A Modern Understanding Of The HIV/Aids Epidemic In Florida

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## **Abstract**

Now, if you go back and you look at the themes of past World AIDS Days, if you read them one after another, [you will] see the story of how the human race has confronted one of the most devastating pandemics in our history.

**KEYWORDS:** HIV/Aids, Florida, epidemic



# ON AN ALTERNATIVE TO A PUNITIVE STATE IN RESPONSE TO A MODERN UNDERSTANDING OF THE HIV/AIDS EPIDEMIC IN FLORIDA

MARIO BRITO\*

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## I. INTRODUCTION

Now, if you go back and you look at the themes of past World AIDS Days, if you read them one after another, [you will] see the story of how the human race has confronted one of the most devastating pandemics in our history. [You will] see that in those early years—when we started losing good men and women to a disease that no one truly understood—it was about ringing the alarm, calling for global action, proving that this deadly disease was not isolated to one area or one group of people. And [that is] part of what makes today so remarkable, because back in those early years, few could have imagined this day—that we would be looking ahead to *The Beginning of the End*, marking a World AIDS Day that has gone from that early beginning when people were still uncertain to now a theme, *Getting to Zero*. . . . But [that is] what [we are] talking about. [That is] why [we are] here. And we arrived here because of all of you and your unwavering belief that we can—and we will—beat this disease.<sup>1</sup>

On June 5, 1981, the Morbidity and Mortality Weekly Report (“MMWR”), an epidemiological digest published by the Centers for Disease Control and Prevention (“CDC”), reported on a pattern of five infections of a rare form of pneumonia known as *Pneumocystis Pneumonia*.<sup>2</sup> The patients

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1. President Barack Obama, Remarks by the President on World AIDS Day at George Washington University (Dec. 1, 2011), <http://www.whitehouse.gov/photos-and-video/video/2011/12/01/president-obama-world-aids-day> (click “Read the Transcript”).

2. *Pneumocystis Pneumonia* — *Los Angeles*, 30 MORBIDITY & MORTALITY WKLY. REP. 250, 250–51 (1981).



were described as *active homosexuals*, two of which had passed away by the time of the published report in the MMWR.<sup>3</sup> All five cases were confined to the Los Angeles metropolitan area.<sup>4</sup>

Shortly thereafter, on July 3, 1981, the New York Times published an article titled: *Rare Cancer Seen in 41 Homosexuals*.<sup>5</sup> This time, it was not *Pneumocystis Pneumonia* that was the centerpiece of the report but rather, a rare cancer known as *Kaposi's Sarcoma*.<sup>6</sup> A mysterious outbreak of rare diseases was spreading.<sup>7</sup> As can be appreciated from the first reports of what later came to be known as *Acquired Immunodeficiency Syndrome* ("AIDS"), the medical profession had very little knowledge of how the disease developed or how it could affect the general public.<sup>8</sup> In the same New York Times article, a physician reports: "The best evidence against infection . . . is that no cases have been reported to date outside the homosexual community or in women."<sup>9</sup>

It was only on September 9, 1983 that the MMWR published a statement stating that there was no evidence that AIDS could be transmitted "through casual contact with AIDS patients or with persons in population groups with an increased incidence of AIDS . . . [or] through food, water, air, or environmental surfaces."<sup>10</sup> The MMWR went on to state that a classification system of those at risk for contracting AIDS would lack precision pending further epidemiological studies.<sup>11</sup>

It was not until January 11, 1985 that the CDC revised its definition of AIDS to identify the viral cause of the disease, *Human Immunodeficiency Virus* ("HIV").<sup>12</sup> We now know that HIV can be contracted by any member

3. *Id.*

4. *See id.*

5. Lawrence K. Altman, *Rare Cancer Seen in 41 Homosexuals*, N.Y. TIMES, July 3, 1981, at A20 [hereinafter Altman, *Rare Cancer Seen in 41 Homosexuals*].

6. *Id.*

7. *Id.*; see also *Pneumocystis Pneumonia — Los Angeles*, *supra* note 2, at 250.

8. See Update: *Acquired Immunodeficiency Syndrome (AIDS) — United States*, 32 MORBIDITY & MORTALITY WKLY. REP. 465, 465–66 (1983); Altman, *Rare Cancer Seen in 41 Homosexuals*, *supra* note 5.

9. Altman, *Rare Cancer Seen in 41 Homosexuals*, *supra* note 5.

10. Update: *Acquired Immunodeficiency Syndrome (AIDS) — United States*, *supra* note 8, at 467.

11. *Id.*

12. Provisional Public Health Service Inter-Agency Recommendations for Screening Donated Blood and Plasma for Antibody to the Virus Causing Acquired Immunodeficiency Syndrome, 34 MORBIDITY & MORTALITY WKLY. REP. 1, 1 (1985) [hereinafter *Provisional Public Health Service Inter-Agency Recommendations*]; see also HIV Infection and Risk, Prevention, and Testing Behaviors Among Injecting Drug Users — National HIV Behavioral Surveillance System 20 U.S. Cities, 2009, MORBIDITY & MORTALITY WKLY. REP., July 4, 2014, at 2.



of the general public and not just by *men who have sex with men* ("MSM").<sup>13</sup> In Surgeon General C. Everett Koop's *Report on Acquired Immune Deficiency Syndrome* on October 22, 1986, the following acknowledgements were made: "Although the initial discovery was in the homosexual community . . . AIDS is found in heterosexual people as well. AIDS is not a black or white disease. AIDS is not just a male disease. AIDS is found in women; it is found in children."<sup>14</sup> "AIDS no longer is the concern of any one segment of society; it is the concern of us all."<sup>15</sup>

The report acknowledged that while it remained a mysterious disease, scientists had learned more about AIDS in the span of five years than they had been able to learn of many other diseases in a larger span of time.<sup>16</sup> The Surgeon General emphasized the need to educate the public on the disease, particularly on risky behaviors that exposed the public to the virus and on the special role of the states in helping to combat the disease.<sup>17</sup> He pointed out that some would not heed his message.<sup>18</sup> He was right; the states did not heed his message.<sup>19</sup>

That same year, three criminal statutory provisions were enacted in the states of Florida, Tennessee, and Washington, making it illegal to transmit HIV.<sup>20</sup> They were the first three states in the United States to criminalize the transmission of the virus.<sup>21</sup> HIV-specific criminal laws vary tremendously in form and function, from specifically criminalizing transmission of the virus to serving as sentence enhancers for people living

13. See *Provisional Public Health Service Inter-Agency Recommendations*, *supra* note 12, at 1 (recognizing HIV statistics for intravenous drug users and women).

14. C. EVERETT KOOP, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 14 (1986).

15. *Id.* at 27.

16. *Id.* at 26.

17. *Id.* at 29–30.

18. *Id.* at 29.

19. See *infra* Parts III–IV (detailing a general lack of understanding and stigma towards HIV-positive individuals permeating into the legal system of many states).

20. J. Stan Lehman et al., *Prevalence and Public Health Implications of State Laws that Criminalize Potential HIV Exposure in the United States*, 18 AIDS & BEHAV. 997, 999 (2014).

21. *Id.*



with HIV/AIDS (“PLWHA”) who have been convicted of certain crimes.<sup>22</sup> Florida has enacted five such provisions.<sup>23</sup>

The National HIV/AIDS Strategy is an effort by the Executive Office of the United States to combat HIV.<sup>24</sup> It originally had three goals: “(1) [r]educing the number of people who become infected with HIV; (2) [i]ncreasing access to care and optimizing health outcomes for people living with HIV; and (3) [r]educing HIV-related health disparities;” but it has recently been updated to encompass a fourth goal—“(4) achieving a more coordinated national response to the HIV epidemic,” which is the main objective of this Comment on a state level.<sup>25</sup> The 2010 National HIV/AIDS Strategy incorporated many recommendations to the states—as does the 2015 update—without which these national efforts would be substantially reduced.<sup>26</sup> Recommendation 3.3 of the 2010 National HIV/AIDS Strategy—which is aimed at state legislatures—encourages the “[p]romot[ion] [of] public health approaches to HIV prevention and care,” while urging the states to revisit criminal statutes in order to “ensure that they are consistent with [the] current knowledge of HIV transmission and [that they] support public health approaches to preventing and treating HIV.”<sup>27</sup>

The purpose of this Comment is both to: (1) encourage the Florida Legislature to revisit its criminal statutes by offering different models that it may look to in doing so; and (2) setting forth recommendations on how to more adequately address the HIV/AIDS epidemic through the adoption of a proactive public health approach to dealing with the epidemic.<sup>28</sup> Florida’s criminal laws are inconsistent with our current knowledge behind HIV transmission, and there are better ways in which the State of Florida can

22. See generally THE CTR. FOR HIV LAW & POLICY, POSITIVE JUSTICE PROJECT, ENDING & DEFENDING AGAINST HIV CRIMINALIZATION: STATE AND FEDERAL LAWS AND PROSECUTIONS, VOL. 1 (updated May 2015) (2010) [hereinafter VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS] (containing all HIV-specific criminal provisions for every state to date).

23. FLA. STAT. § 381.0041(11)(b) (2015); FLA. STAT. § 384.24(2) (2015); FLA. STAT. § 775.0877(3) (2015); FLA. STAT. § 796.08(5) (2015); FLA. STAT. § 384.34(3) (Supp. 1986).

24. THE WHITE HOUSE OFFICE OF NAT’L AIDS POLICY, NATIONAL HIV/AIDS STRATEGY FOR THE UNITED STATES vii (2010), <http://www.whitehouse.gov/sites/default/files/uploads/NHAS.pdf>; see also The White House, *National HIV/AIDS Strategy for the United States: Updated to 2020*, AIDS.GOV (July 2015), <http://www.aids.gov/federal-resources/national-hiv-aids-strategy/nhas-update.pdf> (outlining a vision analogous to the one encouraged by this Comment on a national scale, emphasizing the need for a comprehensive campaign to fight HIV/AIDS by mobilizing resources and citizens to meet specific goals by 2020).

25. THE WHITE HOUSE OFFICE OF NAT’L AIDS POLICY, *supra* note 24, at 1.

26. See *id.* at vii.

27. *Id.* at 37.

28. See *infra* Part IV.



support its public health interest in the prevention of HIV transmission rather than through the criminalization of the acts of persons affected by a medical condition.<sup>29</sup>

Part II of this Comment will look into relevant statutory provisions of interest in the criminalization of HIV transmission within Florida, pointing to both their origin and evolution in an effort to better understand the laws' structure and function.<sup>30</sup> Part III will examine the context in which HIV/AIDS arose, as well as delve into an overview on past and present medical advances behind the HIV/AIDS epidemic.<sup>31</sup> And finally, in terms of substance, Part IV will offer various recommendations and models that the Florida Legislature may consider in reforming its current approach to HIV from both a criminal and a public health perspective.<sup>32</sup>

## II. ON THE CRIMINAL TRANSMISSION OF HIV IN FLORIDA

The following is a layout of Florida's HIV-specific laws dealing explicitly with the criminalization of HIV transmission.<sup>33</sup> The analysis below is not inclusive of two HIV-specific criminal provisions that Florida has codified into law, one of which deals with HIV transmission through prostitution and the other which deals with HIV transmission through blood donation.<sup>34</sup> A general knowledge of the structure and function of the following laws will help in understanding the remainder of this Comment.<sup>35</sup>

### A. Section 384.24 of the Florida Statutes: The Criminal Transmission of HIV Provision

Section 384.24 of the Florida Statutes regulates the transmission of *sexually transmissible diseases*.<sup>36</sup> In its current form, the statutory provision defines all of the following as *sexually transmissible diseases*, as encoded

29. See FLA. STAT. § 775.0877(1), (5) (2015); *How Do You Get HIV or AIDS?*, AIDS.GOV, <http://www.aids.gov/hiv-aids-basics/hiv-aids-101/how-you-get-hiv-aids> (last revised Aug. 27, 2015); *infra* Section IV.B.

30. See *infra* Part II.

31. See *infra* Part III.

32. See *infra* Part IV.

33. See *infra* Sections II.A–C.

34. See FLA. STAT. § 381.0041 (2015); FLA. STAT. § 796.08(5) (2015). These provisions have been omitted in order to focus on the main issue of HIV transmission; however, they too suffer from their own issues. Kim Shayo Buchanan, *When Is HIV a Crime? Sexuality, Gender and Consent*, 99 MINN. L. REV. 1231, 1248–53 (2015). For a discussion on how HIV-specific criminal laws fail to punish the client in instances in which the worker is punished as retribution for prostitution, see *id.* at 1253.

35. See *infra* Sections II.A–C.

36. FLA. STAT. § 384.24 (2015).



into section 384.24(1): “[C]hancroid, gonorrhea, granuloma inguinale, lymphogranuloma venereum, genital herpes simplex, chlamydia, nongonococcal urethritis, . . . pelvic inflammatory disease, . . . or syphilis . . .”<sup>37</sup> Note how HIV is absent from section 384.24(1), as HIV is specifically referenced to in section 384.24(2).<sup>38</sup> Section 384.24(2) is a provision that reads in a roughly identical manner to section 384.24(1) but explicitly relates to HIV:

(2) It is unlawful for any person who has human immunodeficiency virus infection, when such person knows he or she is infected with this disease and when such person has been informed that he or she may communicate this disease to another person through sexual intercourse, to have sexual intercourse with any other person, unless such other person has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse.<sup>39</sup>

The language above contains the following legal elements that constitute the unlawful act described: (1) a person with HIV, (2) who has been informed of the possibility of communicating the disease to another through intercourse, (3) who has sexual intercourse with another, (4) without disclosing the HIV-positive status to the other, and (5) without obtaining consent of the other thereof, violates section 384.24(2) of the Florida Statutes.<sup>40</sup>

Roughly stated, the list above consists of the legal elements required for the criminal transmission of HIV in Florida.<sup>41</sup> Note how this is a general intent law, as the specific intent to commit the crime is absent.<sup>42</sup> It is not

37. *Id.* § 384.24(1).

38. *Id.* § 384.24(1)–(2).

39. *Id.* § 384.24(2).

40. *Id.* § 384.24(2).

41. *See* FLA. STAT. § 384.24(2) (2015).

42. *See id.* § 384.24(2). *General intent* is defined as:

The intent to perform an act even though the actor does not desire the consequences that result. This is the state of mind required for the commission of certain common-law crimes not requiring a specific intent or not imposing strict liability. General intent usu[ally] takes the form of recklessness, involving actual awareness of a risk and the culpable taking of that risk, or negligence, involving blameworthy inadvertence. —Also termed *general criminal intent*, *general mens rea*.

*General Intent*, BLACK’S LAW DICTIONARY (10th ed. 2014). *Specific intent* is defined as “[t]he intent to accomplish the precise criminal act that one is later charged with. At common law, the specific-intent crimes were robbery, assault, larceny, burglary, forgery, false pretenses, embezzlement, attempt, solicitation, and conspiracy. Also termed *criminal intent*.” *Specific Intent*, BLACK’S LAW DICTIONARY (10th ed. 2014).



required under Florida law that a person charged with violating section 384.24 have a specific intent to transmit the virus.<sup>43</sup>

This provision has gone through a legal evolution.<sup>44</sup> As noted in the introduction to this Comment, HIV was introduced to the criminal code in 1986.<sup>45</sup> It followed a basic structure until it was amended in 1997.<sup>46</sup> Until the 1997 amendment, the statute read as follows:

It is unlawful for any person who has chancroid, gonorrhea, granuloma inguinale, lymphogranuloma venereum, genital herpes simplex, chlamydia, nongonococcal urethritis ("NGU"), pelvic inflammatory disease ("PID")/acute salpingitis, syphilis, or human immune deficiency virus infection, when such person knows he or she is infected with one or more of these diseases and when such person has been informed that he or she may communicate this disease to another person through sexual intercourse, to have sexual intercourse with any other person, unless such other person has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse.<sup>47</sup>

As can be noted from the language above, the provision once consisted of only one part.<sup>48</sup> Section 384.24 of the Florida Statutes treated all sexually transmissible diseases equally in one category for purposes of the unlawful act described.<sup>49</sup> It was not until 1997, sixteen years after the start of the HIV epidemic, that the Florida Legislature decided to amend the law to read in the fashion that it does today with a separate category for HIV.<sup>50</sup> For sixteen years, HIV was treated in parity with the other sexually transmissible diseases mentioned in the provision.<sup>51</sup> Up until 1997, the Florida Legislature treated HIV as no more of an evil than genital herpes simplex or chlamydia.<sup>52</sup> What this means is that during the most obscure years of the epidemic—in

43. See FLA. STAT. § 384.24(2) (2015); *infra* Section IV.A.2.a (discussing the absence of specific intent for the criminal transmission of HIV in Florida).

44. See FLA. STAT. § 384.24 (2015); FLA. STAT. § 384.24 (1997); FLA. STAT. § 384.24 (1995); FLA. STAT. § 384.24 (Supp. 1986).

45. See FLA. STAT. § 384.24 (Supp. 1986); *supra* Part I.

46. See FLA. STAT. § 384.24 (1997); FLA. STAT. § 384.24 (Supp. 1986).

47. FLA. STAT. § 384.24 (1995); see also FLA. STAT. § 384.24 (1997).

48. See FLA. STAT. § 384.24 (1995).

49. See *id.*

50. See FLA. STAT. § 384.24 (1997); FLA. STAT. § 384.24 (1995); *Pneumocystis Pneumonia — Los Angeles*, *supra* note 2, at 250.

51. See FLA. STAT. § 384.24 (1995); FLA. STAT. § 384.24 (Supp. 1986).

52. See FLA. STAT. § 384.24 (1995); FLA. STAT. § 384.24 (Supp. 1986). But see FLA. STAT. § 384.24 (1997).



terms of our understanding of the condition—HIV had not been as severely criminalized as it suddenly became in 1997.<sup>53</sup>

B. *Section 384.34 of the Florida Statutes: The Penalties Provision*

The changes enacted in section 384.24 of the Florida Statutes were made along with changes to the respective penalties provisions in section 384.34, effectively targeting HIV transmission as somehow more reprehensible than the transmission of any other sexually transmissible disease.<sup>54</sup> Up until the 1997 amendment, this statutory provision referred to the transmission of any of the sexually transmissible diseases listed in section 384.24 of the Florida Statutes as a *misdemeanor of the first-degree*.<sup>55</sup>

When the provision was amended in 1997, it was changed to read as follows: “(1) [a]ny person who violates the provisions of [section] 384.24(1) commits a misdemeanor of the first degree . . . [and] (5) [a]ny person who violates the provisions of [section] 384.24(2) commits a felony of the third degree . . .”<sup>56</sup>

The transmission of HIV suddenly turned into a third-degree felony, as opposed to a first-degree misdemeanor.<sup>57</sup> In 1998, the provision became even more punitive, reading: “(5) [a]ny person who violates . . . [section] 384.24(2) commits a felony of the third degree . . .” and “[a]ny person who commits multiple violations of . . . [section] 384.24(2) commits a felony of the first degree . . .”<sup>58</sup> Therefore, multiple violations of section 384.24(2) of the Florida Statutes can now result in convictions of first-degree felonies for PLWHA within Florida.<sup>59</sup> The state has become increasingly punitive towards PLWHA throughout the lifespan of the HIV/AIDS epidemic.<sup>60</sup>

53. See FLA. STAT. § 384.24 (1997). For the general criminal provision, see FLA. STAT. § 384.24 (1995); FLA. STAT. § 384.24 (Supp. 1986). But see FLA. STAT. § 384.24 (1997). For the penalties provision, see FLA. STAT. § 384.34 (Supp. 1996); FLA. STAT. § 384.34(1) (Supp. 1986). But see FLA. STAT. § 384.34(5) (1997).

54. See FLA. STAT. § 384.24 (1997); FLA. STAT. § 384.34 (1997). For the general criminal provision, see FLA. STAT. § 384.24 (1995); FLA. STAT. § 384.24 (Supp. 1986). But see FLA. STAT. § 384.24 (1997). For the penalties provision, see FLA. STAT. § 384.34 (Supp. 1996); FLA. STAT. § 384.34(1) (Supp. 1986). But see FLA. STAT. § 384.34(5) (1997).

55. FLA. STAT. § 384.34(1) (Supp. 1996); see also FLA. STAT. § 384.24 (1995).

56. FLA. STAT. § 384.34(1), (5) (1997); see also FLA. STAT. § 384.24 (1997); FLA. STAT. § 384.34(1) (Supp. 1996).

57. See FLA. STAT. § 384.34(5) (1997); FLA. STAT. § 384.34(1) (Supp. 1996).

58. FLA. STAT. § 384.34(5) (Supp. 1998).

59. FLA. STAT. § 384.34(5) (2015); see also FLA. STAT. § 384.24(2) (2015).

60. See FLA. STAT. § 384.34(5) (Supp. 1998); FLA. STAT. § 384.34(5) (1997); FLA. STAT. § 384.34(1) (Supp. 1996); FLA. STAT. § 384.34 (Supp. 1986).



C. *Section 775.0877 of the Florida Statutes: The Sentence Enhancement Provision*

Section 775.0877 of the Florida Statutes is Florida's sentence enhancement provision, which is applied when PLWHA commit certain crimes.<sup>61</sup> In Florida, being HIV-positive is akin to an aggravating circumstance during the commission of certain listed crimes, despite the fact that the statute does not use the term *aggravated circumstance*.<sup>62</sup> The law contains a list of separate crimes under section 775.0877(1) from paragraph (a) through (o).<sup>63</sup> Anyone who pleads guilty, nolo contendere, or has been found guilty of any of the listed crimes, in addition to having exchanged bodily fluids during its commission thereof—and while aware of an HIV-positive diagnosis—commits the criminal transmission of HIV.<sup>64</sup>

Section 775.0877(3) specifies that the criminal transmission of HIV, in this context, is a third-degree felony.<sup>65</sup> The list of crimes to which HIV-positive status becomes a penalty enhancer is extensive and includes but is not limited to: sexual battery, incest, lewd or lascivious offenses, assault, battery, child abuse, elder abuse, prostitution, and the donation of blood.<sup>66</sup> When these independent crimes are committed by PLWHA who have knowledge of their condition—while inclusive of an exchange of bodily fluids—the criminal transmission of HIV, which is in itself a separate crime, is also committed.<sup>67</sup> While not exactly an aggravating circumstance by definition, an HIV-positive status in Florida can certainly act as one by increasing the punishment of the accused substantially through the addition of a third-degree felony.<sup>68</sup>

The provision is vague as to the type of bodily fluid that must be exchanged to result in its application.<sup>69</sup> The statute speaks only of the *transmission of bodily fluids*.<sup>70</sup> Section 775.0877(5) specifies that the actual

61. See FLA. STAT. § 775.0877 (2015).

62. *Id.* *Aggravating circumstance* is defined as “[a] fact or situation that increases the degree of liability or culpability for a criminal act. . . . A fact or situation that relates to a criminal offense or defendant and that is considered by the court in imposing punishment.” *Aggravating Circumstance*, BLACK’S LAW DICTIONARY (10th ed. 2014).

63. FLA. STAT. § 775.0877(1)(a)–(o) (2015).

64. *Id.* § 775.0877(1), (3).

65. *Id.* § 775.0877(3).

66. *Id.* § 775.0877(1)(a)–(n).

67. *Id.* § 775.0877(1), (3).

68. See FLA. STAT. § 775.0877(3) (2015); *Aggravating Circumstance*, *supra* note 62.

69. See FLA. STAT. § 775.0877(1) (2015).

70. *Id.* § 775.0877(1).



transmission of HIV is not required in order for PLWHA to commit the criminal transmission of HIV.<sup>71</sup>

### III. ON A MODERN UNDERSTANDING OF HIV

#### A. *A History of Stigmatization*

##### 1. *Phobia of Minorities*

HIV/AIDS is a disease that emerged with a substantial amount of stigmatization.<sup>72</sup> The first cases of the disease, when people knew the least about its etiology, made it seem as if the disease were contained exclusively within the gay male population.<sup>73</sup> First, the disease was known as *Gay Cancer*—then, as *Gay-Related Immunodeficiency* (“GRID”) or simply as “[G]ay [C]ompromise [S]yndrome.”<sup>74</sup>

The stigma attributed to the disease is evident from the news sources and case law of the day.<sup>75</sup> A *New York Times* article titled *New Homosexual Disorder Worries Health Officials* stated that researchers called the disease “A.I.D., for acquired immunodeficiency disease, or GRID, for [G]ay-[R]elated [I]mmunodeficiency.”<sup>76</sup> The report further emphasized a connection between GRID and gay males:

[I]mmunological tests have led some Federal health officials to fear that tens of thousands of homosexual men may have the acquired immune dysfunction and be at risk for developing complications such as Kaposi’s cancer, infections and other disorders at some future date. GRID is “a matter of urgent public health and scientific importance,” Dr. James W. Curran, a Federal

71. *Id.* § 775.0877(5).

72. See Lawrence K. Altman, *New Homosexual Disorder Worries Health Officials*, N.Y. TIMES, May 11, 1982, at C1 [hereinafter Altman, *New Homosexual Disorder Worries Health Officials*].

73. See *id.*; George A. Oswald et al., *Attempted Immune Stimulation in the “Gay Compromise Syndrome”*, 285 BRIT. MED. J. 1082, 1082 (1982); *Pneumocystis Pneumonia — Los Angeles*, *supra* note 2, at 250 (reporting on first known AIDS cases in the United States among young gay men in Los Angeles).

74. See Altman, *New Homosexual Disorder Worries Health Officials*, *supra* note 72; Oswald et al., *supra* note 73.

75. See *Cooper v. State*, 539 So. 2d 508, 511 (Fla. 1st Dist. Ct. App. 1989); Altman, *New Homosexual Disorder Worries Health Officials*, *supra* note 72.

76. Altman, *New Homosexual Disorder Worries Health Officials*, *supra* note 72.



epidemiologist who coordinates the Centers for Disease Control's task force . . . told the Congressional hearing.<sup>77</sup>

It was not until that same year, in 1982, that the CDC began to use the term AIDS to describe the disease, as is evidenced by the language in the MMWR updates.<sup>78</sup> The MMWR also began to detail a considerable number of cases in population groups other than MSM, such as Haitians, intravenous drug users, and hemophiliacs.<sup>79</sup> It also recognized known cases found in women and the heterosexual community at large.<sup>80</sup>

However, despite the recognition in 1982 that HIV/AIDS was a disease that affected all population groups, the negative stigma remained.<sup>81</sup> Some of the stigma associated with HIV/AIDS is a byproduct of mere statistics, as infections for MSM have consistently been reported high relative to other population groups to the present day—making MSM an easy target for discrimination;<sup>82</sup> likewise, much stigma comes from the fact that traditionally marginalized minorities, such as African-Americans and Hispanics/Latinos, have since experienced a disproportionate increase in infection rates in comparison to the general population.<sup>83</sup>

Homophobia can be easily perceived in the news articles circling the media during the 1980s–1990s.<sup>84</sup> For example, in the same New York Times article referenced above, the following was stated as a fact: “After testing for more than 130 potential risk factors, they found that the median number of lifetime male sexual partners for affected homosexual men was 1,160, compared to 524 for male homosexual men who did not have the syndrome.”<sup>85</sup> This suggests that MSM with HIV/AIDS are somehow at least

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77. *Id.*

78. See *Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS) — United States*, 31 MORBIDITY & MORTALITY WKLY. REP. 507, 507–08, 513–14 (1982).

79. *Id.*

80. *Id.*

81. See *id.*; *Provisional Public Health Service Inter-Agency Recommendations*, *supra* note 12, at 1; Altman, *New Homosexual Disorder Worries Health Officials*, *supra* note 72 (suggesting HIV/AIDS is a gay-related disease while utilizing exaggerated statistics to inflate the perceived promiscuity of gay males).

82. *Today's HIV/AIDS Epidemic*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 2015), <http://www.cdc.gov/nchhstp/newsroom/docs/factsheets/todaysepidemic-508.pdf>. The CDC reports that MSM constituted 63% of all new HIV infections in 2010. *Id.*

83. See *id.* The CDC notes that African-Americans constituted forty-four percent of all new HIV infections in 2010, while Hispanics/Latinos constituted twenty-one percent of all new HIV infections in 2010. *Id.*

84. See Altman, *New Homosexual Disorder Worries Health Officials*, *supra* note 72.

85. *Id.*



twice as promiscuous as MSM without HIV/AIDS.<sup>86</sup> Even if it were true that HIV-positive MSM are somehow more promiscuous than HIV-negative MSM—whether it is 1160 sexual partners or 524 sexual partners—both of these estimates are exorbitant numbers for either the average homosexual or the average heterosexual member of society.<sup>87</sup>

More accurate numbers can be found in a study utilizing data compiled by the CDC, estimating the mean number of sexual partners for MSM from 2006–2010—for twelve-month periods—was about 2.3, significantly lower than 2.9, the average number of sexual partners reported in 2002 alone.<sup>88</sup> At the average rate, it is unlikely that the average number of lifetime sexual partners of MSM could possibly be 524—much less 1160—as reported in the New York Times in 1982.<sup>89</sup> In fact, the average number of sexual partners for MSM in a twelve-month period was found to be no greater than that of heterosexual males.<sup>90</sup>

Homophobia as linked to HIV/AIDS has also permeated modern case law.<sup>91</sup> *Cooper v. State*<sup>92</sup> exemplifies homophobia enshrined within the judiciary, as evidenced by the language in the opinion, stating: “Because of his life-style, Cooper knew or should have known that he had been exposed

86. See *id.*

87. See *id.* In line with CDC statistics, the average number of sexual partners for heterosexual men and for MSM is not very different. See Anjani Chandra et al., *Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data from the 2006–2008 National Survey of Family Growth*, NAT'L HEALTH STAT. REP., no. 36, Mar. 3, 2011, at 1, 18, 20 (showing the average amount of sexual partners for heterosexuals in a twelve-month period, among other statistics pertaining to sexual conduct); Jami S. Leichter et al., *Temporal Trends in Sexual Behavior Among Men Who Have Sex with Men in the United States, 2002 to 2006–2010*, 63 J. ACQUIRED IMMUNE DEFICIENCY SYNDROMES 254, 255 (2013) (showing the average amount of sexual partners for MSM in a twelve-month period—utilizing CDC data—finding no statistical difference between the amount of sexual partners for MSM and heterosexual males); *Today's HIV/AIDS Epidemic*, *supra* note 82.

88. Leichter et al., *supra* note 87, at 255.

89. See *id.*; Altman, *New Homosexual Disorder Worries Health Officials*, *supra* note 72. At the average rate, supposing 2.3 sexual partners every year for eighty years, which is a rather exaggerated and unrealistic proposition, the amount of sexual partners of such a highly active sexually male would be:  $2.3 \times 80 = 184$ . See Leichter et al., *supra* note 87, at 255. Even if utilizing the most exaggerated estimates, conceiving of average MSM to have from 524 to 1160 sexual partners in a lifetime would be an over-exaggeration. See *id.* (finding no statistical difference in the average amount of sexual partners between heterosexual males and MSM within a twelve-month period).

90. See Leichter et al., *supra* note 87, at 255.

91. See Angela Perone, *From Punitive to Proactive: An Alternative Approach for Responding to HIV Criminalization that Departs from Penalizing Marginalized Communities*, 24 HASTINGS WOMEN'S L.J. 363, 379–83 (2013) (discussing case law stigmatizing minorities living with HIV, including a discussion of the *Cooper* case introduced *infra* note 92).

92. 539 So. 2d 508 (Fla. 1st Dist. Ct. App. 1989).



to the AIDS virus . . . .”<sup>93</sup> The defendant’s sentence for sexual battery, solicitation, and aggravated battery was enhanced beyond the sentencing guideline recommendations because he tested positive for HIV prior to sentencing.<sup>94</sup>

This case was decided without the application of any of the Florida provisions aforementioned in Part II.<sup>95</sup> As evidenced by the language in the decision, it was because of the stigma associated with his *homosexual lifestyle* that the defendant either *knew or should have known* of his HIV-positive status.<sup>96</sup> Even the dissent, when pointing to the language of the lower court, cannot alienate itself from the stigma inherent in the language, when quoting: “[T]his defendant, having been an admitted homosexual for years, knew or should have known the likelihood of his having AIDS as a result of these homosexual contacts. . . .”<sup>97</sup> Certainly, at least in this case, having an HIV-positive diagnosis served as an aggravating circumstance within the confines of the court, so much so that the court stepped out of the bounds of its sentencing guidelines.<sup>98</sup>

## 2. Fear of Infection

The cause behind the stigma associated with HIV/AIDS is a complex sociological phenomenon that cannot simply be explained out of a dislike of minorities.<sup>99</sup> It also stems from other factors, such as from an irrational fear of infection, for example—a fear that is exaggerated in the collective mind—as the actual probability of getting infected with HIV is less than one in fifty for condomless receptive anal intercourse from an HIV-positive insertive partner, which is the riskiest of all sexual activities in terms of HIV transmission; a probability which decreases to one in two thousand when the roles are reversed, and the HIV-positive partner is the receptive one.<sup>100</sup> For vaginal sex, the risk is one in one thousand for male-to-female transmission,

93. *Id.* at 511 (exemplifying the homophobic language of the court).

94. *Id.* at 509. Note that the defendant tested positive for HIV prior to sentencing, therefore no previous knowledge of an HIV-positive diagnosis existed as required by Florida law for the criminal transmission of HIV. *Id.* at 511. In fact, the defendant’s knowledge was construed from his *active homosexual lifestyle*—which is what is so shocking about this particular case. *Id.*

95. *See supra* Part II.

96. *Cooper*, 539 So. 2d at 511.

97. *Id.* at 512 (Shivers, J., dissenting).

98. *See id.* at 511.

99. *See* Anish P. Mahajan et al., *Stigma in the HIV/AIDS Epidemic: A Review of the Literature and Recommendations for the Way Forward*, 22 AIDS (SUPP. 2) S67, S72 (2008).

100. *See* Sarah J. Newman, *Prevention, Not Prejudice: The Role of Federal Guidelines in HIV-Criminalization Reform*, 107 NW. U. L. REV. 1403, 1409–10 (2013).



and one in two thousand for female-to-male transmission.<sup>101</sup> Intravenous drug users, while constituting a far smaller proportion of the population than those engaged in an active sexual lifestyle, constitute a sizable proportion of new HIV transmissions and have the highest risk of HIV transmission amongst all subgroups.<sup>102</sup> Although it is true that just one sexual encounter has the potential to transmit HIV from one person to another, and the engagement in risky sexual behaviors is fully discouraged by this Comment, the low transmission rates amongst HIV-negative people engaged in risky sexual activities with PLWHA—without the utilization of any means of protection—suggests that the risk of HIV transmission has become irrationally exaggerated in the collective mind.<sup>103</sup>

Only an irrational fear of infection can explain why in 1984, a young boy by the name of Ryan White was expelled from school.<sup>104</sup> The boy suffered from AIDS after acquisition of HIV from a blood transfusion.<sup>105</sup> His family fought a long battle to keep him in school so that he may attend classes along with other children his age.<sup>106</sup> Expressions of disgust can be appreciated in what a classmate had to say when he was readmitted into school.<sup>107</sup> A girl by the name of Sabrina Johnson said the following regarding his re-admittance: “[We have] fought it and fought it, and [it is] over now. . . . As long as he keeps his distance, [he is okay].”<sup>108</sup>

Ryan White was not the only child afflicted by HIV/AIDS against whom society cruelly turned.<sup>109</sup> In fact, the State of Florida made headlines in 1987, when the home of a family of three children afflicted by the disease was burned down following a court order mandating the integration of the children into the DeSoto County School System.<sup>110</sup> All three children were hemophiliacs.<sup>111</sup>

The case that ended in the order to reintegrate the children is *Ray v. School District of DeSoto County*.<sup>112</sup> It was acknowledged by the court (1)

101. *Id.* at 1410.

102. Dita Broz et al., *HIV Infection and Risk, Prevention, and Testing Behaviors Among Injecting Drug Users — National HIV Behavioral Surveillance System 20 U.S. Cities, 2009*, 63 MORBIDITY & MORTALITY WKLY REP. 1, 2 (July 4, 2014).

103. See Newman, *supra* note 100, at 1409–10.

104. *14-Year-Old Boy with AIDS Attends School After 2 Years*, N.Y. TIMES, Aug. 26, 1986, at B3.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *14-Year-Old Boy with AIDS Attends School After 2 Years*, *supra* note 104.

110. *Family in AIDS Case Quits Florida Town After House Burns*, N.Y. TIMES, Aug. 30, 1987, at A1.

111. *Id.*

112. 666 F. Supp. 1524, 1538 (M.D. Fla. 1987).



that all three children were hemophiliacs; (2) that all three children came into contact with HIV through the Factor VIII clotting agent; (3) that the Ray family voluntarily decided to disclose the HIV status of the children, at which time they were removed from school; and (4) that the school board subsequently denied enrollment to Richard, Robert, and Randy Ray.<sup>113</sup> The court depicts the science behind HIV in 1987 quite accurately, stating that: "A full-blown case of AIDS is believed by the medical community to be 'incurable and almost inevitably fatal.' As stated by Surgeon General C. Everett Koop, M.D., Sc.D., in an interview on July 31, 1987, this is the *real thing*."<sup>114</sup>

The court goes on to compare the HIV epidemic to a polio outbreak of forty-five years prior, which caused a panic in the community.<sup>115</sup> But the court goes on to note that despite the memories, "[t]he [c]ourt must take medical science as it *now* finds it."<sup>116</sup> The medical science summarized by the court recognized the following: (1) that the CDC reported its first cases of AIDS in 1981; (2) that AIDS was caused by an infection of HIV; (3) that HIV weakens the immune system; (4) that there was no cure for HIV and that finding one would be complex; (5) that casual contact with people infected with HIV was found not to lead to infection in others; and (6) that in one study, none of the closest casual contacts of hemophiliac subjects had contracted HIV.<sup>117</sup>

A preliminary injunction was issued against the DeSoto County School Board.<sup>118</sup> The concern and fear of the parents, although real, was not substantiated by science.<sup>119</sup> The harm that the Ray children could pose to the public was merely *theoretical*, and the irreparable injury that would be done to the children by depriving them of their education outweighed any theoretical harm that they could possibly pose to society by attending school.<sup>120</sup> Because of this victory in court, the Ray family home was burned, and they subsequently relocated out of South Florida.<sup>121</sup>

Perhaps it is an irrational fear of infection that drives society to reject those with HIV/AIDS time and again.<sup>122</sup> But an irrational fear of infection, just as are homophobia, racism, and any other fear that is unsubstantiated by

113. *Id.* at 1527–28.

114. *Id.* at 1529 (citation omitted).

115. *Id.*

116. *Id.*

117. *Ray*, 666 F. Supp. at 1529–31.

118. *Id.* at 1538.

119. *Id.* at 1529–31.

120. *Id.* at 1534–35.

121. *Family in AIDS Case Quits Florida Town After House Burns*, *supra* note 110; see also *Ray*, 666 F. Supp. at 1538.

122. See Mahajan et al., *supra* note 99, at 67.



science—should have no place within our legal system.<sup>123</sup> The Florida Legislature should rethink its laws by scrutinizing the current science behind HIV, just as Judge Elizabeth A. Kovachevich of the Middle District of Florida reasoned through the facts presented in the *Ray* decision.<sup>124</sup> The Florida Legislature should not allow for unsubstantiated fears to dictate the law of the land in Florida.<sup>125</sup>

## B. *The Science Behind HIV/AIDS*

### 1. AZT and the Need for Better Treatment

News that the Food and Drug Administration (“FDA”) approved the first medication developed specifically to combat HIV infection reached the public on March 20, 1987.<sup>126</sup> The drug developed was zidovudine, most commonly known as AZT.<sup>127</sup> With AZT came grants by the Health Resources and Health Administration (“HRSA”) to the individual states, with amounts in relation to the relative spread of the virus amongst their populations.<sup>128</sup> New York, California, Texas, Florida, and New Jersey received the most money.<sup>129</sup> The money was provided through the HRSA’s AZT Drug Reimbursement Program, a precursor to the Ryan White CARE Act, introduced below.<sup>130</sup>

The first medication approved for the treatment of HIV proved to be plagued with problems.<sup>131</sup> AZT is known to cause severe life-threatening adverse effects on its users.<sup>132</sup> Such adverse effects include an extensive list provided in the official description of the medication, including but not limited to “liver damage, blood toxicities, and muscle disorders,” along with a general disclaimer that the list provided is not exhaustive of all side effects that may occur.<sup>133</sup> In addition to the drastic side effects of AZT, the HIV virus was found to develop resistance to the medication, rendering it

123. See *Ray*, 666 F. Supp. at 1529; *infra* Section IV.A (suggesting changes to the law in order to repeal or amend provisions at odds with modern science).

124. See *Ray*, 666 F. Supp. at 1529–31; *infra* Sections III.B, IV.A.

125. See Newman, *supra* note 100, at 1406.

126. AZT Program Launches with Awards of \$30 Million, HRSA.GOV, <http://hab.hrsa.gov/livinghistory/timeline/1987.htm> (last visited Feb. 8, 2016).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*; see also 42 U.S.C. § 300ff (2012); *Who Was Ryan White?*, HRSA.GOV, <http://hab.hrsa.gov/about/hab/ryanwhite.html> (last visited Feb. 8, 2016).

131. See U.S. Nat’l Library of Med., *Zidovudine Injection*, NIH.GOV, <http://nlm.nih.gov/medlineplus/druginfo/meds/a601168.html> (last revised Oct. 15, 2012).

132. *Id.*

133. *Id.*



ineffective.<sup>134</sup> Statistical studies found that while AZT was beneficial from about twelve to twenty-four months, during longer periods of time the effectiveness of AZT decreased until there was no statistically significant difference between groups taking AZT and groups taking a placebo.<sup>135</sup> These results indicated the need for a better combination of HIV medications for people living with the condition in order to prevent it from turning into full-blown AIDS.<sup>136</sup>

Before delving into the scientific advances that have in connection to our understanding of HIV, it is only fair to acknowledge that many of the advances in medicine that have been made available to PLWHA throughout the years have reached them through the Ryan White CARE Act, enacted in 1990.<sup>137</sup> Ryan White, one of the boys mentioned in the preceding subsection who was expelled from school for being HIV-positive, died of AIDS-related complications just a few months before the Act that bears his name was enacted into law.<sup>138</sup> The federal Act provides financial assistance to people who otherwise could not pay for the HIV medications that they need to survive.<sup>139</sup> It is a payer of last resort that has been consistently funded throughout the years.<sup>140</sup>

Thankfully, current medical advances behind HIV are very different from the ones presented in the *Ray* case.<sup>141</sup> Current pharmacological treatments give PLWHA more than just hope for a cure, they give them life.<sup>142</sup> Society must recognize that what was not possible for Ryan White in 1990 is possible today thanks to the advances in medicine that have come

134. See Nat'l Inst. of Allergy & Infectious Diseases, *AZT and AIDS*, NIH.GOV, <http://www.niaid.nih.gov/topics/HIV/AIDS/Understanding/Treatment/Pages/AZTandAIDS.aspx> (last updated Mar., 23, 2010); U.S. Nat'l Library of Med., *supra* note 131.

135. Nat'l Inst. of Allergy & Infectious Diseases, *supra* note 134. Placebo is defined as a pill or substance that is given to a patient like a drug but that has no physical effect on the patient. See *Placebo*, MERRIAM-WEBSTER'S, COLLEGIATE DICTIONARY (11th ed. 2003).

136. See Lawrence K. Altman, *Experts to Review AZT Role As the Chief Drug for H.I.V.*, N.Y. TIMES, Sept. 17, 1995, at 1.38 [hereinafter Altman, *Experts to Review AZT Role As the Chief Drug for H.I.V.*].

137. 42 U.S.C. § 300ff (2012); see also *infra* Section III.B.2.

138. *Who Was Ryan White?*, *supra* note 130; see also *supra* Section III.A.2.

139. 42 U.S.C. § 300ff; *About the Ryan White HIV/AIDS Program*, HRSA.GOV, <http://hab.hrsa.gov/abouthab/aboutprogram.html> (last visited Feb. 8, 2016).

140. See 42 U.S.C. § 300ff; *About the Ryan White HIV/AIDS Program*, *supra* note 139.

141. See *Ray v. Sch. Dist.*, 666 F. Supp. 1524, 1529 (M.D. Fla. 1987); *About the Ryan White HIV/AIDS Program*, *supra* note 139.

142. See *Who Was Ryan White?*, *supra* note 130.



about in the last few decades.<sup>143</sup> If today's medications had existed in 1990, Ryan White would likely be living today.<sup>144</sup>

## 2. The Advent of Modern Treatment

In September 1995, The New York Times reported:

After years of recommending AZT as the first-line drug for treating the virus that causes AIDS, Federal health officials are considering a change because of surprising results with other drugs. Dr. Anthony S. Fauci, the director of the National Institute of Allergy and Infectious Diseases, said in an interview that he planned to convene a meeting where independent experts could decide whether AZT should remain the first choice. . . . The findings should lead scientists to focus on developing improved combinations of anti-H.I.V. drugs, Dr. Fauci said. For instance, recent studies have shown favorable results from a combination of AZT and a drug called 3TC. And with AIDS experts hailing the promise of a new class of drugs known as protease inhibitors, studies of different combinations may demonstrate substantially increased benefits, Dr. Fauci said.<sup>145</sup>

Researchers found a new class of drugs that radically altered the course of the HIV/AIDS epidemic.<sup>146</sup> Today, there are six major classes of drugs used to treat HIV/AIDS—the antiretroviral drugs.<sup>147</sup> As scientists have learned, various drugs must be taken in conjunction because HIV is highly adaptive to the drugs used to combat its proliferation, and therefore, only a combination of various classes of drugs can effectively reduce the HIV viral load.<sup>148</sup> The combination must be of at least three drugs from a separate combination of at least two classes of drugs, which is termed antiretroviral therapy (“ART”).<sup>149</sup> ART greatly reduces the amount of HIV in the blood of PLWHA—often to levels so low that HIV cannot even be

143. See *id.*

144. See *id.*

145. See Altman, *Experts to Review AZT Role As the Chief Drug for H.I.V.*, *supra* note 136.

146. See *Types of HIV/AIDS Antiretroviral Drugs*, NIH.GOV, <http://www.niaid.nih.gov/topics/hivaids/understanding/treatment/Pages/arvDrugClasses.aspx> (last updated Sept. 23, 2013).

147. *Id.*

148. *Id.*

149. *HIV Overview: FDA-Approved HIV Medicines*, AIDSINFO, <http://aidsinfo.nih.gov/education-materials/fact-sheets/21/58/fda-approved-hiv-medicines#> (last updated May 4, 2015); *Types of HIV/AIDS Antiretroviral Drugs*, *supra* note 146.



detected by standard highly-sensitive laboratory tests.<sup>150</sup> Such a low viral count is known as an *undetectable viral load*.<sup>151</sup> Having an undetectable viral load has been found to reduce the transmission of HIV by up to ninety-six percent.<sup>152</sup>

Several single drugs to be taken once a day have been approved by the FDA since 2006.<sup>153</sup> An example of one such drug is Stribild, which was approved in 2012 and is a combination of a set of drugs itself.<sup>154</sup> Patients may therefore now choose to take one pill, once a day, instead of several independent pills.<sup>155</sup> Studies have found that such once-a-day pill regimens reduce the risk of missed dosages often accompanying complex multidrug regimens that require the administration of several pills over the course of a day.<sup>156</sup> As more PLWHA adhere to their medication regimen, there is a reduction in the the HIV viral load on an individual level, which in turn reduces the HIV viral load in the community as a whole.<sup>157</sup>

Another recent pharmacological development in the treatment of HIV is usage of the drug combination tenofovir-emtricitabine—most commonly referred to as Truvada—as an antiretroviral pre-exposure prophylaxis (“PrEP”).<sup>158</sup> PrEP is used as a pharmacotherapeutic agent to decrease HIV infection among uninfected persons.<sup>159</sup> Such usage can help people in high-risk populations, such as MSM or others who are at an elevated risk of engaging in high-risk sexual activity such as persons in

150. *Viral Load*, AIDS.GOV, <http://www.aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/understand-your-test-results/viral-load> (last updated Sept. 3, 2015).

151. *Id.*

152. *HIV Treatment As Prevention*, AVERT, <http://www.avert.org/professionals/hiv-prevention-programming/treatment-as-prevention> (last reviewed May 1, 2015).

153. See Andrew Pollack, *New Medicine for AIDS Is One Pill, Once a Day*, N.Y. TIMES, July 9, 2006 at 10. Atripla was the first once-a-day pill approved by the FDA in 2006. See Cynthia Brinson, *Stribild, a Single Tablet Regimen for the Treatment of HIV Disease*, 3 COMBINATION PRODUCTS THERAPY 1, 1 (2013).

154. See Brinson, *supra* note 153, at 1 (detailing the effectiveness of Stribild as a once-a-day pill regimen for PLWHA).

155. See *id.*

156. Patrick G. Clay et al., “One Pill, Once Daily”: What Clinicians Need to Know About Atripla, 4 THERAPEUTICS & CLINICAL RISK MGMT. 291, 299–300 (2008).

157. *Id.* at 300.

158. *How Is Truvada Used to Treat HIV-1 Infection?*, TRUVADA, <http://www.truvada.com/treatment-for-hiv> (last visited Feb. 8, 2016).

159. *Pre-Exposure Prophylaxis (PrEP)*, AIDS.GOV, <http://www.aids.gov/hiv-aids-basics/prevention/reduce-your-risk/pre-exposure-prophylaxis/index.html> (last revised Mar. 24, 2015). AIDS.gov defines PrEP succinctly as “Pre-Exposure Prophylaxis.” *Id.* The word *prophylaxis* means, “to prevent or control the spread of an infection or disease.” *Id.* “PrEP is a way for people who [do not] have HIV to prevent HIV infection by taking a pill every day.” *Id.*



serodiscordant relationships, to protect themselves against HIV transmission.<sup>160</sup>

A study conducted in the countries of Kenya and Uganda with 4758 couples revealed the effectiveness of this drug combination for the prevention of HIV transmission.<sup>161</sup> The couples were members of serodiscordant relationships, where one partner was HIV-positive, and the other partner was HIV-negative.<sup>162</sup> The couples were randomized into one of three groups.<sup>163</sup> The first group was given tenofovir by itself, the second group a combination of tenofovir-emtricitabine, and the remaining group was given a placebo.<sup>164</sup> Tenofovir-emtricitabine, the combination found within Truvada, proved effective in the prevention of HIV transmission.<sup>165</sup> In women, results suggest the efficacy of preventing HIV transmission to be 71% for tenofovir and 66% for tenofovir-emtricitabine when compared directly to the placebo.<sup>166</sup> Among men, the results were similar, with the efficacy of tenofovir as opposed to tenofovir-emtricitabine at 63% and 84%, respectively.<sup>167</sup> The discrepancy between the use of a single drug and the use of a combination of the two drugs proved to be negligible, but the use of these drugs as an antiretroviral PrEP proved effective.<sup>168</sup> Another study conducted in various countries suggests that MSM who inconsistently take Truvada as PrEP may reduce their risk of contracting HIV by 44% while the risk of contracting HIV for MSM who take Truvada consistently is reduced by 92%.<sup>169</sup>

It should be noted that all of these drugs, regardless of how effective or advanced they are in their ability to prevent HIV transmission—can still cause serious side effects.<sup>170</sup> However, to put the effectiveness of the drugs into perspective, a recent study conducted in the United Kingdom with a

160. See *How Is Truvada Used to Treat HIV-1 Infection?*, *supra* note 158; *Mixed-Status Couples*, AIDS.GOV, <http://www.aids.gov/hiv-aids-basics/staying-healthy-with-hiv-aids/friends-and-family/mixed-status-couples> (last revised Oct. 27, 2014).

161. J.M. Baeten et al., *Antiretroviral Prophylaxis for HIV Prevention in Heterosexual Men and Women*, 367 NEW ENG. J. MED. 399, 399 (2012).

162. *Id.* at 400.

163. *Id.* at 399.

164. *Id.*

165. *Id.* at 407.

166. Baeten et al., *supra* note 161, at 404.

167. *Id.*

168. *Id.*

169. Robert M. Grant et al., *Preexposure Chemoprophylaxis for HIV Prevention in Men Who Have Sex with Men*, 363 NEW ENG. J. MED. 2587, 2594, 2596–97 (2010).

170. *Stribild Side Effects*, DRUGS.COM, <http://www.drugs.com/sfx/stribild-side-effects.html> (last visited Feb. 8, 2016); *Truvada Side Effects*, DRUGS.COM, <http://www.drugs.com/sfx/truvada-side-effects.html> (last visited Feb. 8, 2016).



large sample of more than twenty-thousand individuals living with HIV, estimates the life expectancy of men diagnosed with HIV at the ages of twenty, thirty-five, and fifty—at sixty-eight, seventy-three, and seventy-seven, respectively.<sup>171</sup> This was compared to HIV-negative men in the general population, whose life expectancy at the ages of twenty, thirty-five, and fifty were estimated to be seventy-seven, seventy-eight, and seventy-nine, respectively.<sup>172</sup> For HIV-positive women, the figures are similar, with minimal variation from the general population.<sup>173</sup> This is a truly novel development considering that an HIV-positive diagnosis had been widely regarded as a death sentence.<sup>174</sup>

Consistent condom use can reduce HIV transmission by 80% to 90%;<sup>175</sup> ART has been found to reduce HIV transmission by up to 96% through its ability to achieve an undetectable viral load,<sup>176</sup> and Truvada has been found to be 92% effective against the transmission of HIV.<sup>177</sup> Drugs may also be taken immediately after exposure to HIV for preventing infection, which can happen in medical settings or due to other causes such as rape.<sup>178</sup> This is known as post-exposure prophylaxis (“PEP”), and it has been shown to be so effective that less than one in one hundred medical professionals have acquired HIV in this way after exposure to the virus.<sup>179</sup> Medical advances have also aided in reducing the risk of transmission of HIV from mother to child during and immediately following a pregnancy.<sup>180</sup>

Current medical advances are no longer those of the 1990s that failed to save the life of Ryan White, nor are they part of the science of 1997 when Florida amended its statutes to make HIV transmission a felony.<sup>181</sup> The

171. Margaret T. May et al., *Impact on Life Expectancy of HIV-1 Positive Individuals of CD4<sup>+</sup> Cell Count and Viral Load Response to Antiretroviral Therapy*, 28 AIDS 1193, 1195–96 (2014).

172. *Id.*

173. *Id.*

174. *See supra* Section III.A.

175. Markus Steiner & Pamela DeCarlo, *What is the Role of Male Condoms in HIV Prevention?*, U. CAL. S.F., <http://caps.ucsf.edu/uploads/pubs/FS/pdf/condomFS.pdf> (last revised Jan. 2005).

176. *See HIV Treatment as Prevention, supra* note 152; *Viral Load, supra* note 150.

177. *See* Grant et al., *supra* note 169, at 2590.

178. *Post-Exposure Prophylaxis*, AIDS.GOV, <http://www.aids.gov/hiv-aids-basics/prevention/reduce-your-risk/post-exposure-prophylaxis/index.html> (last revised Sept. 21, 2015) (explaining what PEP is).

179. *Id.*

180. *See* Shahabudeen K. Khan, *The Threat Lives On: How to Exclude Expectant Mothers from Prosecution for Mere Exposure of HIV to their Fetuses and Infants*, 63 CLEV. ST. L. REV. 429, 434–35 (2015) (discussing medical advances in HIV/AIDS prevention from mother to child).

181. *See* FLA. STAT. § 384.34 (1997); *supra* Parts II–III.



medical advances of today have greatly expanded our understanding on the mechanisms behind HIV/AIDS, on proven methods to reduce HIV transmission, and on pharmacological advances effective at improving the quantity and quality of life of those infected with HIV.<sup>182</sup>

#### IV. RECOMMENDATIONS: ON CRIMES AND ON AN ALTERNATIVE TO A PUNITIVE STATE

In the United States, there are a number of jurisdictions that criminalize the transmission of HIV by statute.<sup>183</sup> The number of states with HIV-specific criminal laws fluctuates, but it is consistently reported to be slightly above thirty.<sup>184</sup> The Florida Statutes are very punitive in relation to the transmission of HIV.<sup>185</sup> Section 384.34 makes the criminal transmission of HIV a third-degree felony, and when involving multiple acts, the statute attributes to the criminal transmission of HIV status as a first-degree felony.<sup>186</sup> Florida was the first state in the country to criminalize the transmission of HIV amid widespread fears of infection following media reports that an HIV-positive woman had been working as a prostitute.<sup>187</sup> Furthermore, the irrational fears of HIV infection acquired from negative press were a driving force behind the revisions and Florida's subsequent adoption of the 1997 amendments to sections 384.24 and 384.34 of the Florida Statutes, which effectively segregated HIV from other sexually transmissible diseases and enhanced its penalties provision from a misdemeanor to a felony.<sup>188</sup>

President Reagan was not the swiftest in addressing the HIV/AIDS epidemic and has been widely criticized for waiting too long to recognize the existence of an epidemic.<sup>189</sup> In fact, it was not until 1987, six years after the

182. See *supra* Part III.

183. VOL. I STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 2 (containing a comprehensive list of all HIV-specific criminal laws in the nation).

184. See Lehman et al., *supra* note 20, at 1000 (depicting patterns in the adoption of such HIV-specific criminal laws throughout the country).

185. See generally FLA. STAT.(2015). See VOL. I STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 39–45 (discussing at length the way in which HIV-specific criminal provisions have been used in Florida to prosecute PLWHA).

186. FLA. STAT. § 384.34(5) (2015).

187. Buchanan, *supra* note 34, at 1299.

188. *Id.* at 1299–1300 (pointing out that the Florida legislature cited infamous HIV-transmission cases in making HIV-transmission a class I felony); see also FLA. STAT. §§ 384.24, .34(5) (1997).

189. See RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC 466 (1987) (chronicling the difficulty of getting the Reagan administration to act during the early years of the HIV/AIDS epidemic); Newman, *supra* note 100, at 1412–



beginning of the epidemic, that President Reagan initiated the *Presidential Commission on the Human Immunodeficiency Virus Epidemic*.<sup>190</sup> What resulted was a report from the Commission that called for, amongst many other recommendations, an end to the transmission of the disease through the utilization of the criminal justice system.<sup>191</sup> The creation of new criminal provisions to combat HIV were encouraged, as traditional criminal laws such as assault were deemed *too lenient* by the commission.<sup>192</sup> Recommendation 96-47 encourages the following:

Adoption by the states of a criminal statute—directed to those HIV-infected individuals who know of their status and engage in behaviors which they know are, according to scientific research, likely to result in transmission of HIV—clearly setting forth those specific behaviors subject to criminal sanctions. With regard to sexual transmission, the statute should impose on HIV-infected individuals who know of their status specific affirmative duties to disclose their condition to sexual partners, to obtain their partners' knowing consent, and to use precautions, punishing only for failure to comply with these affirmative duties.<sup>193</sup>

The above language is eerily similar to Florida's chief criminal transmission provision in spirit and purpose.<sup>194</sup> It is also proper to note here, just as it was noted in Part III above, that the Ryan White CARE Act has had an effect on this area of the law.<sup>195</sup> When the Ryan White CARE Act was enacted, a temporary provision was incorporated that called for every state to certify that its criminal laws were "adequate to prosecute any HIV infected individual" who knowingly exposed another to HIV.<sup>196</sup> Although many states had already passed HIV-specific criminal laws, many other states that

15 (detailing the reaction of the Reagan Administration to the advent of the HIV/AIDS epidemic).

190. See Newman, *supra* note 100, at 1412.

191. REPORT OF THE PRESIDENTIAL COMM'N ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 130-31 (1988), <http://ia700402.us.archive.org/14/items/reportofpresiden00pres/reportofpresiden00pres.pdf>.

192. *Id.* at 130.

193. *Id.* at 131.

194. Compare *id.* (articulating recommendation 9-46), with FLA. STAT. § 384.24(2) (2015).

195. Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No 10-381, § 2, 104 Stat. 576, 603 (1990); see also Leslie E. Wolf & Richard Vezina, *Is There a Role for Criminal Law in HIV Prevention?*, U. CAL. S.F., (May 2005), <http://caps.ucsf.edu/uploads/pubs/FS/pdf/criminalizationFS.pdf> (pointing out the effect of the Ryan White CARE Act in the promulgation of new state HIV-criminalization laws); *supra* Part III.

196. § 2647, 104 Stat. at 603.



had not adopted such provisions passed them after 1990.<sup>197</sup> Within this atmosphere encouraging the criminalization of HIV transmission by the Federal Government, it would be unfair to wholly blame Florida for the draconian changes it made to its HIV-specific laws in 1997, abruptly segregating HIV from other sexually transmissible diseases, and drastically enhancing criminal penalties for PLWHA.<sup>198</sup> Since then, the national atmosphere has experienced a drastic change and as noted in the introduction to this Comment, the stance of the Federal Government is now reversed with the National HIV/AIDS Strategy.<sup>199</sup> A national effort has been launched that is inclusive of the desire to see the criminal laws of the past revised updated to match with modern science.<sup>200</sup>

There are various prominent organizations that have taken a stance against the prosecution of the criminal transmission of HIV.<sup>201</sup> Of particular importance are the American Medical Association (“AMA”) and the Association of Nurses in AIDS Care (“ANAC”).<sup>202</sup> The stance of such organizations is important because they are professional associations composed of leaders within the healthcare industry who are charged with providing adequate medical care to those suffering from HIV/AIDS and are therefore uniquely situated to opine about HIV/AIDS in relation to public health issues.<sup>203</sup> The AMA recently amended its policy *H-20.914* to read as follows, with changes denoted in italics:

197. See Lehman et al., *supra* note 20, at 1000 (depicting patterns in the adoption of HIV-specific criminal laws throughout the country).

198. See FLA. STAT. §§ 384.24(2), .34(5) (1997).

199. See Lehman et al., *supra* note 20, at 998 (noting the change in the stance of the national government from the time of the passage of the Ryan White CARE Act to the present National HIV/AIDS Strategy); The White House, *supra* note 24, at 37 (encouraging legislatures, under recommendation 3.3, to revisit HIV-specific criminal laws and ensure that they are up to date with current scientific knowledge in methods of transmission).

200. The White House, *supra* note 24, at 6 (encouraging modern HIV-specific criminal laws to be “scientifically based, and that prosecutors and others in law enforcement have an accurate understanding of transmission risks”).

201. See Medical Student Section Resolution 8 (AM. MED. ASS’N 2013); Richard Elliot, *Criminal Law, Public Health and HIV Transmission: A Policy Options Paper*, UNAIDS 5 (June 2002), <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/SUMMARY%20OF%20ACTIONS%20Medical%20Student%20Section%20Resolutions.pdf>; *Position Statement: HIV Criminalization Laws and Policies Promote Discrimination and Must Be Reformed*, ASS’N NURSES AIDS CARE (Nov. 2014), [http://www.nursesinaidscare.org/files/public/ANAC\\_PS\\_Criminalization\\_December2014\\_FinalforJANAC.pdf](http://www.nursesinaidscare.org/files/public/ANAC_PS_Criminalization_December2014_FinalforJANAC.pdf) [hereinafter *Position Statement*].

202. See Medical Student Section Resolution 8, *supra* note 201; *Position Statement*, *supra* note 201.

203. See Medical Student Section Resolution 8, *supra* note 201; *Position Statement*, *supra* note 201.



*Discrimination and Criminalization Based on HIV Seropositivity.* Our AMA: (1) Remains cognizant of and concerned about society's perception of, and discrimination against, HIV-positive people; (2) Condemns any act and opposes any legislation of categorical discrimination based on an individual's actual or imagined disease, including HIV infection; this includes [c]ongressional mandates calling for the discharge of otherwise qualified individuals from the armed services solely because of their HIV seropositivity; (3) Encourages vigorous enforcement of existing antidiscrimination statutes, incorporation of HIV in future federal legislation that addresses discrimination, and enactment and enforcement of state and local laws, ordinances, and regulations to penalize those who illegally discriminate against persons based on disease; and (4) Encourages medical staff to work closely with hospital administration and governing bodies to establish appropriate policies regarding HIV-positive patients; and (5) *Supports consistency of federal and state criminal laws with current medical and scientific knowledge and accepted human rights-based approaches to disease control and prevention, including avoidance of any imposition of unwarranted punishment based on health and disability status; and (6) Encourages public education and understanding of the stigma created by HIV criminalization statutes and subsequent negative clinical and public health consequences.*<sup>204</sup>

The above public health policy statement is important because it demonstrates that the AMA supports the premises of this Comment.<sup>205</sup> Points (5) and (6) stand in support of the following subsection, calling for criminal laws to be updated in relation to medical scientific advances and encouraging an understanding of the negative social implications of such laws on persons living with this condition.<sup>206</sup> The ANAC's policy, while more extensive in detail than the AMA's, mirrors the AMA's as to points (5) and (6) yet offers another main objective: "[The] [r]epeal of punitive laws that single out HIV infection or any other communicable disease and that include inappropriate or enhanced penalties for alleged nondisclosure, exposure, and transmission."<sup>207</sup> This is squarely in accordance with the following section, calling for the repeal of unjust provisions that enhance penalties for people living with HIV.<sup>208</sup> The ANAC's policy also contains

204. See Medical Student Section Resolution 8, *supra* note 201.

205. See *id.*

206. *Id.*; see also *infra* Section IV.A.

207. Position Statement, *supra* note 201; see also Medical Student Section Resolution 8, *supra* note 201.

208. See Elliot, *supra* note 201, at 5; *infra* Section IV.A.



the following language about HIV-specific criminal laws which directly supports the arguments presented in the following subsections, stating:

These laws are based on outdated and erroneous information about HIV risk and transmission and further promote misinformation that contributes to stigma and discrimination. These criminal laws contradict public health messages regarding individual responsibility for safer sex, do not alter behavior, can create a disincentive for seeking HIV testing, and potentially alienate patients from health care providers. These laws disregard current knowledge about treatment efficacy, including significantly reduced transmission potential when a person living with HIV has an undetectable HIV viral load.<sup>209</sup>

Expanding on the message promulgated by the AMA and the ANAC through their official stances on these issues, section A below touches upon the harm that HIV-specific criminal laws pose on the public health system and proposes alternatives for either repealing or reforming these provisions within Florida.<sup>210</sup> Section B, on the other hand, focuses on finding an alternate pathway to a punitive state through the proposal of a proactive model to better address and combat the transmission of HIV.<sup>211</sup>

#### A. *On Crimes*

The purpose behind the criminal laws targeting HIV transmission must be evaluated.<sup>212</sup> The Joint United Nations Programme on HIV/AIDS (“UNAIDS”) points out that the main purpose of HIV-specific criminal laws must be to prevent HIV transmission.<sup>213</sup> This report provides a detailed analysis of how such laws fail to meet traditional criminal law objectives, which will typically include either: (1) incapacitation, (2) rehabilitation, (3) retribution, or (4) deterrence.<sup>214</sup>

HIV-specific criminal laws do not serve any of the criminal law objectives mentioned above.<sup>215</sup> UNAIDS points out that, in terms of incapacitation, prisons and jails are just another venue for the transmission of HIV.<sup>216</sup> A prisoner is not truly incapacitated from stopping infection

209. *Position Statement*, *supra* note 201.

210. *See infra* Section IV.A.

211. *See infra* Section IV.B.

212. Elliot, *supra* note 201, at 5 (questioning the policy behind HIV-specific criminal laws).

213. *Id.* at 15.

214. *Id.* at 20–22.

215. *See id.*

216. *See id.* at 20.



amongst the population, but instead a prisoner will likely engage in risky sexual practices while incarcerated.<sup>217</sup> As a matter of fact, when a prisoner and those who had sexual contact with him are released, more people are now at risk of HIV transmission.<sup>218</sup>

Just as with incapacitation, the goal of rehabilitation will not serve its purpose.<sup>219</sup> Complex human drives, such as a person's desire to engage in sexual activities, are not altered through imprisonment.<sup>220</sup> Risky sexual behaviors can be better addressed through counseling and proactive measures rather than through criminal punishment.<sup>221</sup> No data has shown that people who are incarcerated pursuant to HIV-specific criminal laws change their behavior following such incarceration.<sup>222</sup>

Retribution is also not an adequate justification for incarcerating someone for HIV transmission, particularly where there is an absence of a guilty mind as part of the *mens rea* component required of the defendant.<sup>223</sup> This point is particularly important because the law in Florida does not require the specific intent to transmit HIV—which casts doubt over any attempt to seek retribution for acts that do not entail such guilty mind.<sup>224</sup>

Likewise, deterrence as a goal is not a good way to prevent transmission of HIV, as sexual acts are not driven so much by reason but rather by many other complex emotional drives that deterrence cannot destroy.<sup>225</sup> For deterrence to be effective, reasoning and logic must be the driver behind the decision not to engage in the prohibited act.<sup>226</sup> The criminal prosecution of HIV transmission is elusive as to its utility in a philosophical sense—and yet its ability to have a tangible negative effect on

217. See Elliot, *supra* note 201, at 20.

218. See *id.*

219. See *id.*

220. *Id.*

221. *Id.*

222. Elliot, *supra* note 201, at 20.

223. *Id.* at 20–21. *Mens rea* is defined as:

The state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime . . . . *Mens rea* is the second of two essential elements of every crime at common law, the other being the *actus reus*. Under the Model Penal Code, the required levels of *mens rea*—expressed by the adverbs purposely, knowingly, recklessly, and negligently—are termed *culpability requirements*.—Also termed mental element; criminal intent; guilty mind.

*Mens Rea*, BLACK'S LAW DICTIONARY (10th ed. 2014).

224. See FLA. STAT. § 384.24 (2015); Elliot, *supra* note 201, at 21; *infra* Section IV.A.2.a (discussing the need for specific intent within Florida's HIV-specific criminal provisions).

225. See Elliot, *supra* note 201, at 21.

226. See *id.*



PLWHA is quite real, as it leaves behind lasting psychological and physiological repercussions.<sup>227</sup>

The stance of the United Nations on the criminalization of HIV transmission is clear; as an institution, it opposes it.<sup>228</sup> UNAIDS points out that criminalization of HIV transmission undermines public health initiatives.<sup>229</sup> Noted in UNAIDS's policy statement are a number of powerful statements related to HIV-specific criminal laws and their threat to the public health, including the following: (1) when a prosecution of HIV is depicted through media sources, real people perceive HIV carriers as threats to the general public; (2) erroneous ideas about how HIV is contracted are therefore spread, fanning stigma, fear and discrimination—as many statutes criminalize the transmission of HIV through means that could not possibly transmit the virus, such as through saliva; (3) the criminal laws serve as a disincentive for PLWHA to seek HIV-related counseling, testing, treatment and support because of the negative consequences that they believe that may arise from seeking help—such as believing that they will be prosecuted, or that their private information will be divulged to others; (4) criminal laws undermine the efforts of social workers and counselors to promote confidence between PLWHA and themselves, because their confidences may be subject to judicial orders to testify against the very same PLWHA that they seek to aid; and (5) HIV-specific criminal statutes undermine public health initiatives by providing the public with a false sense of security, as HIV-negative people should not rely on such laws in place of practicing safe sex.<sup>230</sup>

A research study conducted in the United Kingdom following the first criminal prosecution for HIV transmission in that country suggests prosecutions based on HIV transmission serve only to stigmatize those living with HIV/AIDS and pose a threat to public health initiatives.<sup>231</sup> A sample of 125 HIV-positive participants was used, consisting of 20 focus groups, each composed of 5 to 12 participants.<sup>232</sup> Transcripts from the conversations were

227. See Catherine Dodds & Peter Keogh, *Criminal Prosecutions for HIV Transmission: People Living with HIV Respond*, 17 INT. J. OF STD & AIDS 315, 316–18 (2006) (noting the psychological stigmatization that HIV-specific criminal laws have on PLWHA, as well as the public health repercussions that such stigmatization fosters); Elliot, *supra* note 201 at 23–25; Clare Dyer, *HIV Conviction Is a Landmark Case*, BBC NEWS (Oct. 14, 2003, 3:30 PM), [http://news.bbc.co.uk/2/hi/uk\\_news/3191312.stm](http://news.bbc.co.uk/2/hi/uk_news/3191312.stm).

228. Elliot, *supra* note 201, at 32.

229. *Id.* at 23.

230. See Elliot, *supra* note 201, at 7, 23–25; *infra* Section IV.B.3.b (discussing the public health objective of promoting individual responsibility for safer sex practices).

231. Dodds & Keogh, *supra* note 227, at 315, 317–18.

232. *Id.* at 315.



scrutinized, and comments were divided into twelve thematic categories.<sup>233</sup> Of all comments, 90% were critical of the criminalization of the reckless transmission of HIV.<sup>234</sup> The comments fell into two major categories: (1) shared responsibility, and (2) stigma and discrimination.<sup>235</sup> One of the comments identified by these researchers, which typifies the *shared responsibility* concern, reads as follows: “There is something called collective responsibility. I think . . . [the complainant] should be responsible for their lives in the first place—female African respondent.”<sup>236</sup> In a comment illustrating the second category, another participant stated: “So I don’t want to go back to that hospital. I even fear to go back there because of the Dica case [first successful HIV prosecution in England and Wales]—male African respondent.”<sup>237</sup>

The research study referenced in the preceding paragraph indicates that PLWHA felt a heightened sense of stigma after successful prosecutions in the United Kingdom.<sup>238</sup> HIV-related prosecutions roll back public health efforts aimed at treating PLWHA, as suggested by their direct comments, as well as by the collective concern of professional associations within the public health system.<sup>239</sup>

It is our role to challenge the State of Florida as to the rationale behind its HIV criminalization laws—and as to their necessity.<sup>240</sup> PLWHA are no more of a threat to society today than they were in 1997, 1986, or 1981, just as they are no more of a threat to the United Kingdom today than they were before that country’s first effective prosecution against HIV transmission took place.<sup>241</sup> The State of Florida has taken it upon itself to revisit its criminal laws time and again throughout the living years of the HIV epidemic in order to further penalize transmission of the condition.<sup>242</sup>

233. *Id.* at 316.

234. *Id.*

235. *Id.*

236. Dodds & Keogh, *supra* note 227, at 316; *see also infra* Section IV.B.3.b (discussing the public health objective of promoting individual responsibility for safer sex practices).

237. *See* Dodds & Keogh, *supra* note 227, at 316; Dyer, *supra* note 227 (reporting on the first HIV-specific criminal conviction in England and Wales).

238. *See* Dodds & Keogh, *supra* note 227, at 316–18.

239. *See* Position Statement, *supra* note 201; *supra* Section IV.A.

240. *See* FLA. STAT. §§ 381.0041, 796.08(5) (2015); Position Statement, *supra* note 201; *infra* Sections IV.A.1–3 (questioning the function and framework of such laws).

241. *See, e.g.,* Ray v. Sch. Dist., 666 F. Supp. 1524, 1529–31 (M.D. Fla. 1987); Dodds & Keogh, *supra* note 227, at 315–18; *supra* Part III (pointing out the unfounded fears that form a part of the history of stigmatization behind HIV/AIDS).

242. *See, e.g.,* FLA. STAT. § 384.34(5) (Supp. 1998); FLA. STAT. § 384.34(5) (1997); FLA. STAT. § 384.34(1) (Supp. 1996); *supra* Part II (mentioning the various changes Florida has made to its HIV-specific criminal laws, making them increasingly punitive).



The state should revisit them again today. Below are three models that Florida may turn to in reforming its HIV criminalization laws.<sup>243</sup>

### 1. The Texas Model

Florida can repeal its HIV-specific criminal laws in their entirety. A number of states have never passed HIV-specific criminal laws and instead rely on their traditional criminal codes.<sup>244</sup> Texas is one of them;<sup>245</sup> New York is another.<sup>246</sup> Texas applies its aggravated assault and attempted murder statutes to HIV transmission.<sup>247</sup> In reversing and remanding a lower court's prosecution, an appellate court in Texas ruled that HIV constituted a deadly weapon.<sup>248</sup>

The lack of HIV-specific laws does not mean that such states do not use their traditional criminal laws in order to convict suspects where such convictions are based on unfounded science.<sup>249</sup> Texas uses its laws in the prosecution of cases that could not possibly result in HIV transmission.<sup>250</sup> In 2008, a Texas court sentenced a homeless man to thirty-five years for allegedly spitting at an officer.<sup>251</sup> The saliva of the suspect was deemed a deadly weapon in spite of the fact that HIV cannot possibly be transmitted through saliva.<sup>252</sup> The officer did not acquire HIV, as expected.<sup>253</sup> The convicted man will only be eligible for parole halfway through his sentence.<sup>254</sup> He maintains to this day that he never spat at the officer.<sup>255</sup> The

243. See *infra* Sections IV.A.1-3.

244. See generally VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22 (specifying each state where HIV-specific criminal laws do not exist).

245. See *id.* at 222 (noting that no HIV-specific criminal laws exist in Texas).

246. See *id.* at 151-52 (noting that no HIV-specific criminal laws exist in New York).

247. See *id.* at 222-29 (providing numerous examples in which Texas has used its general criminal code to prosecute PLWHA).

248. *Mathonican v. State*, 194 S.W.3d 59, 67-68 (Tex. Ct. App. 2006).

249. See VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 222-29 (providing numerous examples in which Texas has used its general criminal code to prosecute PLWHA).

250. *Id.*

251. Gretel C. Kovach, *Prison for Man with H.I.V. Who Spit on a Police Officer*, N.Y. TIMES, May 16, 2008, at A16.

252. *Id.*; see also *How Do You Get HIV or AIDS?*, *supra* note 29 (noting that HIV cannot be transmitted through air, water, saliva, tears, sweat, insects, dishes, bottles, toilet seats, or casual contact).

253. See Kovach, *supra* note 251.

254. *Id.*

255. *Id.*



law in Florida does not function exactly like Texas' law in this respect,<sup>256</sup> but it should be noted that section 775.0877 of the Florida Statutes is similar in spirit to the case law in Texas in that it utilizes rather ambiguous language to encompass erroneously perceived means of HIV transmission, such as the term *body fluids*, which may or may not encompass saliva.<sup>257</sup> Section 775.0877 of the Florida Statutes even specifies that transmission of HIV is not required.<sup>258</sup>

Such spitting cases are not restricted to places where HIV-specific criminal laws are lacking, such as in Texas; they happen in Florida as well, where HIV-specific criminal laws exist.<sup>259</sup> This brings up several questions: (1) what is the purpose of section 775.0877 of the Florida Statutes, Florida's sentence enhancement provision; (2) is it to prevent criminal transmission of HIV, or is it simply to penalize PLWHA because of their HIV-positive status; and (3) why does the law in Florida not require HIV transmission, or even the mere possibility of HIV transmission—, as it is a fact that certain bodily fluids could not possibly transmit the virus.<sup>260</sup> The law in Florida seems to accomplish the same thing that Texas has accomplished through its general aggravated assault provisions; it renders the imagined plausibility of HIV transmission as an aggravated circumstance.<sup>261</sup> If the purpose of HIV-specific criminal laws is to prevent HIV-transmission, a true concern for the transmission of HIV would be backed by laws that actually punish the intentional transmission of the virus or at the very least the possibility of

256. See FLA. STAT. § 775.0877(1) (2015); VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 42, 222 (noting that an HIV-positive Florida man was charged with attempted murder under the state's traditional criminal laws in Florida for yelling that he had HIV and biting an officer—he was subsequently sentenced to fifteen years in prison for aggravated battery with a deadly weapon).

257. FLA. STAT. § 775.0877(1) (2015); see also *How Do You Get HIV or AIDS?*, *supra* note 29; VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 42, 222, 222 nn.1208–09.

258. FLA. STAT. § 775.0877(5) (2015).

259. See *id.* § 775.0877(1) (2015); BSO: *HIV-Infected Woman Jailed for Spitting on Deputy*, CBS MIAMI (Apr. 18, 2014, 5:15 PM), <http://miami.cbslocal.com/2014/04/18/police-trespassing-turns-to-transmitting-disease> (reporting on a case where a woman got charged with the criminal transmission of HIV because she spit on an officer and while ignoring scientific knowledge that HIV cannot be transmitted through saliva—the officer was provided medical treatment for exposure to HIV); VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 222.

260. See FLA. STAT. § 775.0877 (2015); *How Do You Get HIV or AIDS?*, *supra* note 29.

261. See VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 222; *supra* Section II.C (discussing how HIV-positive status under section 775.0877 of the 2015 Florida Statutes is treated as an aggravated circumstance).



such transmission.<sup>262</sup> It is conceivable to imagine a case in Florida where elder abuse has occurred and where the HIV-positive aggressor spits during the course of the abuse, and subsequently section 775.0877 of the Florida Statutes is applied to enhance sentencing by incorporation of the criminal transmission of HIV as an additional offense.<sup>263</sup>

The conduct of the state should reflect modern science, either where HIV-specific laws exist or where such laws are lacking, and the general criminal code is used instead.<sup>264</sup> States should not use statutes to strip people of their freedom in situations where such people could not possibly have committed the crimes they are being convicted of, particularly if such convictions are based on irrational fears or discredited science.<sup>265</sup> The saliva of PLWHA is not a dangerous weapon.<sup>266</sup> If Florida entirely repeals its HIV-specific criminal provisions, it is urged not to use the remainder of its criminal code to prosecute cases that do not serve the public interest and only undermine public health efforts by spreading unfounded fears of HIV infection.<sup>267</sup> Such fears would only serve to further stigmatize PLWHA.<sup>268</sup>

## 2. The California Model

Section 120291 of the California Health and Safety Code is California's main provision on the criminal transmission of HIV and is

262. See Elliot, *supra* note 201, at 15 (noting that the only purpose of HIV-specific criminal laws should be the prevention of HIV-transmission).

263. See FLA. STAT. § 775.0877 (2015); BSO: *HIV-Infected Woman Jailed for Spitting on Deputy*, *supra* note 259. If it happens when an officer is spat at, what is there to prevent Florida's HIV penalty enhancement provision from being utilized in a domestic setting? See FLA. STAT. § 775.0877 (2015); BSO: *HIV-Infected Woman Jailed for Spitting on Deputy*, *supra* note 259.

264. See Ray v. Sch. Dist., 666 F. Supp. 1524, 1529 (M.D. Fla. 1987); *supra* Sections III.A.2, B.2 (discussing the modern science behind HIV).

265. See VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 225; Dodds & Keogh, *supra* note 227, at 315–16; Kovach, *supra* note 251; *How Do You Get HIV or AIDS?*, *supra* note 29; *supra* Part IV (providing examples of cases where the criminal law is utilized at odds with science in order to prosecute PLWHA where HIV-transmission cannot occur).

266. See *How Do You Get HIV or AIDS?*, *supra* note 29 (noting that HIV cannot be transmitted through saliva). But see Mathonican v. State, 194 S.W.3d 59, 67–68 (Tex. Ct. App. 2006) (where the judge insists that the saliva of PLWHA is a deadly weapon).

267. See Elliott, *supra* note 201, at 23–25 (pointing out that criminal prosecutions for HIV transmission lead to inflammatory media coverage that exacerbates stigma against PLWHA, in turn hindering public health efforts).

268. *Id.*; Dodds & Keogh, *supra* note 227, at 316–17 (documenting negative feelings of PLWHA following a highly publicized prosecution for the criminal transmission of HIV).



therefore analogous to section 384.24 of the Florida Statutes.<sup>269</sup> It reads as follows:

(a) Any person who exposes another to the human immunodeficiency virus—HIV—by engaging in unprotected sexual activity when the infected person knows at the time of the unprotected sex that he or she is infected with HIV, has not disclosed his or her HIV-positive status, and acts with the specific intent to infect the other person with HIV, is guilty of a felony punishable by imprisonment in the state prison for three, five, or eight years. Evidence that the person had knowledge of his or her HIV-positive status, without additional evidence, shall not be sufficient to prove specific intent.<sup>270</sup>

Three main differences can be appreciated when comparing California's law to Florida's.<sup>271</sup> In California, (1) the criminal provision explicitly criminalizes unprotected sexual activity, (2) it requires the specific intent to transmit the virus, and (3) it makes explicitly clear that mere knowledge of an HIV-positive diagnosis is not enough to obtain a conviction where further evidence of intent is lacking.<sup>272</sup> All three of these additional requirements are absent in the Florida provision.<sup>273</sup>

#### a. *Specific Intent*

The value in having specific intent codified in the law ties into the discussion of the objective behind the criminal law.<sup>274</sup> If the objective of section 384.24 of the Florida Statutes is to either seek retribution for or to deter criminal acts, then Florida should amend the provision to target only acts where the specific intent to transmit HIV exists.<sup>275</sup> This would ensure that the public health of citizens is protected from the intentional spread of

269. See CAL. HEALTH & SAFETY CODE § 120291 (West 2015); FLA. STAT. § 384.24 (2015).

270. CAL. HEALTH & SAFETY CODE § 120291(a) (West 2015).

271. Compare *id.*, with FLA. STAT. § 384.24 (2015).

272. CAL. HEALTH & SAFETY CODE § 120291 (West 2015).

273. Compare *id.*, with FLA. STAT. § 384.24 (2015).

274. See CAL. HEALTH & SAFETY CODE § 120291(a) (West 2015); THE GLOB. COMM'N ON HIV & THE LAW, RISKS, RIGHTS & HEALTH 20, 24 (2012), <http://www.hivlawcommission.org/resources/report/FinalReport-Risks,Rights&Health-EN.pdf>.

275. THE GLOB. COMM'N ON HIV & THE LAW, *supra* note 274, at 24 (noting that HIV-related criminalization is only justified for prosecuting intentional cases of HIV transmission); see also CAL. HEALTH & SAFETY CODE § 120291(1)-(2) (2015).



HIV where criminal intent exists and that PLWHA are not prosecuted for crimes they did not commit.<sup>276</sup>

Merely knowing of an HIV-positive diagnosis should not be enough to construe a criminal intent to transmit the virus.<sup>277</sup> Proper care under an ART regimen can make the viral load of people living with HIV undetectable, significantly reducing the risk of HIV transmission to undetectable levels.<sup>278</sup> PLWHA cannot be said to desire the transmission of HIV merely because of engaging in sexually active lifestyles.<sup>279</sup> The law in Florida effectively ignores the science behind the probability of HIV transmission—irrespective of the facts of a particular case—regardless of whether ART, Truvada, or condoms are involved.<sup>280</sup> This effectively ensures the targeting of PLWHA for merely carrying the virus through the cold disregard of any actual intent to transmit the disease.<sup>281</sup> The answer as to why someone who knows that he or she has an HIV-positive diagnosis and may not wish to disclose such a status is a complex one and often involves varying factors, such as the fear of being rejected, a person's present engagement in an abusive relationship, or the belief that the virus will not be transmitted because of precautions that the person has taken against HIV transmission.<sup>282</sup>

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276. See THE GLOB. COMM'N ON HIV & THE LAW, *supra* note 274, at 23–25 (noting that prosecutions of PLWHA where the intent to transmit HIV is not proven raise a set of questions as to the motivations behind the alleged acts that do not lead to verifiable answers).

277. See *id.* at 24 (noting that prosecutions based on recklessness and negligence require proof of mens rea that are difficult to verify, and that such prosecutions raise a myriad of doubts regarding the psychological and physical condition of the defendant, whose prosecution may result in injustice).

278. *Viral Load*, *supra* note 150 (pointing out that ART can result in an undetectable viral load, which has been found to reduce the transmission of HIV by up to ninety-three percent); see also *HIV Control Through Treatment Durably Prevents Heterosexual Transmission of Virus*, AIDS.GOV: BLOG (July 20, 2015), <http://blog.aids.gov/2015/07/hiv-control-through-treatment-durably-prevents-heterosexual-transmission-of-virus.html>.

279. See THE GLOB. COMM'N ON HIV & THE LAW, *supra* note 274, at 20 (pointing out the fundamental injustice of laws which criminalize HIV transmission in imposing systems of surveillance and punishment upon sexually active PLWHA).

280. See FLA. STAT. § 384.24(2) (2015); FLA. STAT. § 775.0877(1)–(5) (2015); THE GLOB. COMM'N ON HIV & THE LAW, *supra* note 274, at 20, 22; *How Is Truvada Used to Treat HIV-1 Infection?*, *supra* note 158; Steiner & DeCarlo, *supra* note 175; *Viral Load*, *supra* note 150.

281. See FLA. STAT. § 384.24(2) (2015); FLA. STAT. § 775.0877(1)–(5) (2015); *General Intent*, *supra* note 42.

282. Buchanan, *supra* note 34, at 1257 (discussing complex reasons on why PLWHA may fail to disclose their HIV status to a partner).



The Center for HIV Law and Policy, a national organization dedicated to advocating in favor of the human rights of PLWHA, applauds the modernization of HIV-specific state laws, and even suggests additional changes for the state of California.<sup>283</sup> It notes that specific intent may not be necessary in some instances, given that “[c]ases in which people living with HIV engage in conduct with the specific intent and actual likelihood to inflict harm through transmission of HIV are exceedingly rare and, regardless, can be addressed through existing criminal assault statutes,” which falls back on the Texas model above.<sup>284</sup>

In Florida’s case, a simple amendment to its provisions can ensure that only criminals are incarcerated for true, intentional crimes.<sup>285</sup> The best route for Florida may be either to repeal sections 384.24 and 775.0877 of the Florida Statutes in their entirety or to amend them to fit the crime by adding the requirement of a specific intent to transmit HIV.<sup>286</sup> Such a determination will rest on the Florida Legislature.<sup>287</sup> However, allowing the provisions to remain in their present form is cruel and unjust considering how they are often used to prosecute people who did not intend to transmit HIV.<sup>288</sup>

#### b. *Affirmative Defenses*

The law in California also offers the affirmative defense of condom use.<sup>289</sup> That is, if PLWHA use condoms, it negates the criminal transmission

283. THE CTR FOR HIV LAW & POLICY, ENDING AND DEFENDING AGAINST HIV CRIMINALIZATION: THIS IS HOW WE WIN, A TOOLKIT FOR COMMUNITY ADVOCATES, VOL. 3, at i, 21–22 (2013).

284. *Id.* at 34; see also Buchanan, *supra* note 34, at 1254 (pointing out the rarity of intentional HIV transmission, and noting that when it does happen, it often involves means other than through sexual contact such as the deliberate injection of contaminated blood through needles); *supra* Part IV.A.1.

285. THE GLOB. COMM’N ON HIV & THE LAW, *supra* note 274 at 24–25; see generally FLA. STAT. § 384.24 (2015); FLA. STAT. § 775.0877 (2015).

286. THE GLOB. COMM’N ON HIV & THE LAW, *supra* note 274, at 24–25; *Specific Intent*, *supra* note 42; see generally FLA. STAT. § 384.24 (2015); FLA. STAT. § 775.0877 (2015).

287. See Elliot, *supra* note 201, at 8; THE GLOB. COMM’N ON HIV & THE LAW, *supra* note 274, at 15; VOL. I STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 23.

288. See THE GLOB. COMM’N ON HIV & THE LAW, *supra* note 274, at 24–25 (pointing out a myriad of questions that surface over the fairness in prosecuting PLWHA when the specific intent to transmit HIV is not required by HIV-specific criminal provisions); VOL. I STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 8–11 (providing many examples of prosecutions where the specific intent to transmit HIV is absent).

289. See CAL. HEALTH & SAFETY CODE § 120291(b)(2) (West 2015) (defining the unprotected sexual activity required to violate the provision as “sexual activity without the



of HIV pursuant to section 120291 of the California Health and Safety Code.<sup>290</sup> Other protective measures that PLWHA may use against HIV transmission include ART, Truvada as PrEP for usage by a sexual partner, and engaging in sexual practices that minimize infection—such as engaging in oral sex.<sup>291</sup> Such measures would not amount to an affirmative defense under California law as per the language in the present statute, but they may raise a valid argument in court.<sup>292</sup>

In Florida, the usage of condoms does not serve as an affirmative defense against the criminal transmission of HIV.<sup>293</sup> PLWHA are always suspects under the law when they engage in sexual activity in Florida.<sup>294</sup> The only affirmative defense in Florida is either a lack of knowledge of an HIV-positive status on the side of the accused or an acknowledgement form recognizing disclosure on the side of the accused and consent from the other party—which is a sure means to prove that such disclosure and consent took place prior to engagement in sexual activity.<sup>295</sup>

The Sero Project, a national network of PLWHA and their families fighting the discrimination and stigmatization associated with an HIV-positive status, is glad to provide such an acknowledgement form ensuring that adequate notification was provided to the presumably uninfected partner.<sup>296</sup> This may be an exaggerated measure, but unfortunately, it may also be necessary to protect PLWHA from being accused of crimes they did not commit in states such as Florida.<sup>297</sup> Otherwise, the court's arguments are

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use of a condom"). Affirmative defense is defined as: "A defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all [of] the allegations in the complaint are true. The defendant bears the burden of proving an affirmative defense. . . . Also termed *plea in avoidance*; *plea in justification*." *Affirmative Defense*, BLACK'S LAW DICTIONARY (10th ed. 2014).

290. See CAL. HEALTH & SAFETY CODE § 120291(a)–(b).

291. See *Truvada Side Effects*, *supra* note 170; *Viral Load*, *supra* note 150.

292. See CAL. HEALTH & SAFETY CODE § 120291(b)(2) (specifying only condoms as a means of protected sexual activity).

293. See FLA. STAT. §§ 384.24(2), 775.0877(6) (2015).

294. FLA. STAT. §§ 384.24, 775.0877 (2015); see also VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTION, *supra* note 22, at 3.

295. FLA. STAT. § 384.24(2) (2015) (specifying that criminal HIV transmission only occurs "when such person knows [that] he or she is infected with this disease and when such person has been informed that he or she may communicate this disease," and when his or her partner "has been informed of the presence of the sexually transmissible disease and has consented to the sexual intercourse."); *HIV Criminalization: What You Need to Know*, SEROPROJECT.COM (2012), [http://www.seropproject.com/wp-content/uploads/2012/10/sero\\_brochure\\_colorprint-1-1.pdf](http://www.seropproject.com/wp-content/uploads/2012/10/sero_brochure_colorprint-1-1.pdf) (providing an HIV-status disclosure form for PLWHA).

296. *HIV Criminalization: What You Need to Know*, *supra* note 295 (providing an HIV status disclosure form for PLWHA).

297. See *id.*; THE GLOB. COMM'N ON HIV & THE LAW, *supra* note 274, at 24–25 (pointing out a myriad of questions that surface over the fairness in prosecuting of PLWHA);



prone to involvement of a *he said, she said* style litigation, where one party claims the disclosure of HIV status and consent, while the other party asserts the non-disclosure of HIV status and a lack of consent to sexual intimacy.<sup>298</sup> Recommendations by the Sero Project to PLWHA in order to prove disclosure, include:

[1)] Save email[s], text exchanges, voicemail recordings, social media profiles or other evidence that you disclosed your HIV-[positive] status—if arrested, your computer may be seized; save copies in a safe separate location; [2)] [t]ake your partner with you to your doctor or caseworker and ask them to note your partner's knowledge of your HIV-[positive] status in your file; [3)] [t]alk about your HIV-[positive] status in front of your partner and a third party you trust who could testify that you disclosed; [4)] [m]ake a video with your partner . . . about your HIV status [discussing] your HIV status [with your partner]; [5)] [k]eep a diary . . . [of] occasions when you discussed your HIV status with your partner; [6)] [m]ake note of physical evidence of your HIV-[positive] status, like medications in clear sight, doctor visit reminders, HIV-related brochures or magazines, etc., that others have seen; [and] [7)] [h]ave your partner sign an acknowledgement form . . . .<sup>299</sup>

Section 384.24 of the Florida Statutes can be changed with a simple amendment, providing protection to PLWHA from frivolous claims by including new defenses—affirmative or otherwise—for responsible individuals, such as a presumption of innocence where: (1) a condom was used; (2) the individual had an undetectable viral load; (3) Truvada as PrEP was used by an individual's sexual partner; (4) consensual engagement in sexual acts with a low risk of HIV transmission occurred as a means to mitigate the possibility of transmission; or (5) no actual HIV transmission took place between parties.<sup>300</sup>

VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 3, 3 n.8, 4, 4 n.13, 8, 14–15, 15 n.39 29, 44 (providing many examples of prosecutions where partners have accused HIV-positive people of non-disclosure).

298. See VOL. 1 STATE AND FEDERAL LAWS AND PROSECUTIONS, *supra* note 22, at 8, 14–15, 29, 44 (providing many examples of prosecutions where partners have accused HIV-positive people of non-disclosure).

299. HIV Criminalization: What You Need to Know, *supra* note 295 (depicting such points under the heading PROTECT YOURSELF).

300. FLA. STAT. § 384.24 (2015); see also CAL. HEALTH & SAFETY CODE § 120291 (West 2015); FLA. STAT. § 775.0877(5) (2015); IOWA CODE ANN. § 709D.3 (West 2015); *How Is Truvada Used to Treat HIV-1 Infection?*, *supra* note 158; *Viral Load*, *supra* note 150; *supra* Part III (discussing such prevention methods against HIV transmission); *infra*



c. *Limiting Sentence Enhancement to Sexual Offenses*

Section 12022.85 of the California Penal Code is California's sentence enhancement provision for specific crimes committed by PLWHA.<sup>301</sup> Unlike section 775.0877 of the Florida Statutes, the California provision limits sentence enhancement to sexual crimes, such as rape and unlawful intercourse, as defined by the code.<sup>302</sup> Florida's law is more encompassing of a longer list of crimes and includes crimes such as battery, aggravated assault, and elder abuse, which may or may not include sex crimes.<sup>303</sup>

HIV is most commonly transmitted through sexual contact and intravenous drug use.<sup>304</sup> Such recognition is central to the HIV criminal transmission provisions of both states, as it is an essential element of the crimes described in both section 120291 of the California Health and Safety Code and section 384.24 of the Florida Statutes for the transmission of HIV to happen through sexual contact.<sup>305</sup> It is inconsistent with modern science that section 775.0877 of the Florida Statutes requires *only* "the transmission of body fluids from one person to another" in addition to one of its listed crimes in order for the *criminal transmission of HIV* to take place.<sup>306</sup> To make matters even more disturbing, the Florida provision does not even require the actual the transmission of the virus.<sup>307</sup>

Florida must recognize that saliva, tears, and several other bodily fluids do not transmit HIV.<sup>308</sup> A good place to start is by limiting section 775.0877 of the Florida Statutes in scope to sexual offenses, just as section 384.24 is limited only to sexual acts.<sup>309</sup> The Florida Legislature may also limit the scope of section 775.0877 by deleting from the provision crimes,

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Section IV.B.3 (referencing the Iowa Code while offering further models for incorporation of defenses).

301. CAL. PENAL CODE § 12022.85 (West 2015).

302. Compare *id.* § 12022.85(b) (West 2015), with FLA. STAT. § 775.0877(1) (2015).

303. FLA. STAT. § 775.0877(1) (2015).

304. See CTRS. FOR DISEASE CONTROL & PREVENTION, HIV PREVENTION: PROGRESS TO DATE (2013), <http://www.cdc.gov/nchhstp/ux-test-2015/newsroom/docs/factsheets/progress-508.pdf>.

305. See CAL. HEALTH & SAFETY CODE § 120291 (West 2015); FLA. STAT. § 384.24(2) (2015).

306. FLA. STAT. § 775.0877(1), (3) (2015).

307. *Id.* § 775.0877(5) (explicitly denoted in the provision as a separate point).

308. See *How Do You Get HIV or AIDS?*, *supra* note 29 (noting that HIV cannot be transmitted through air, water, saliva, tears, sweat, insects, dishes, bottles, toilet seats, or casual contact).

309. Compare FLA. STAT. § 775.0877(1) (2015), with FLA. STAT. § 384.24(2) (2015).



such as battery and aggravated assault, both of which are difficult to conceive in relation to the transmission of HIV when a crime such as rape is absent.<sup>310</sup> This provision is squarely at odds with modern medical science.<sup>311</sup>

### 3. The Iowa Model

Iowa is the only state that has modernized its HIV-specific criminal laws after the National HIV/AIDS Strategy was launched in 2010.<sup>312</sup> The State of Iowa has come a long way in modernizing its HIV-specific criminal laws, from a state in which the supreme court took judicial notice of the erroneous belief that “oral sex is a well [known] recognized means of transmission of the HIV” in 2006,<sup>313</sup> to one that takes into account “practical means to prevent transmission.”<sup>314</sup>

Section 709D.3 of the Iowa Code contains one of the most scientifically sound HIV criminalization laws in the nation.<sup>315</sup> It takes into account the intent to transmit HIV, brings the condition into parity with other infectious diseases, makes available a number of defenses, and takes into account whether or not the virus was actually transmitted to the alleged victim.<sup>316</sup>

The Iowa provision makes an intentional act culminating in infection a class “B” felony; an intentional act not resulting in infection a class “D” felony; an unintentional yet “reckless” act as to the life of another, where such act culminated in infection of the other, a class “D” felony; and an unintentional yet “reckless” act as to the life of another, where such act did not culminate in infection to the other, as a “serious misdemeanor.”<sup>317</sup> The

310. See FLA. STAT. § 775.0877(1) (2015). But see CAL. HEALTH & SAFETY CODE § 120291 (West 2015).

311. See FLA. STAT. § 775.0877(1) (2015); *How Do You Get HIV or AIDS?*, *supra* note 29.

312. *HIV is Not a Crime*, ONEIOWA, <http://www.oneiowa.org/work/hiv> (last visited Feb. 8, 2016); see also Iowa Dep’t of Pub. Health, *Discussion of Revisions to Iowa Code 709C — Criminal Transmission of HIV*, CTR. FOR HIV L. & POL’Y (Jan. 2012), <http://www.hivlawandpolicy.org/sites/www.hivlawandpolicy.org/files/709C%20Fact%20Sheet%20for%20IDPH.pdf> (depicting the topics officials discussed in reforming Iowa’s draconian model, with an eye to aligning the state with the National HIV/AIDS Strategy).

313. *State v. Stevens*, 719 N.W.2d 547, 551 (Iowa 2006); see also Buchanan, *supra* note 34, at 1248 (pointing to this fact).

314. See IOWA CODE ANN. §§ 709D.2, 709D.3 (West 2015).

315. See *id.* § 709D.3; *HIV is Not a Crime*, *supra* note 312 (pointing to the success of the organization in lobbying the Iowa Legislature to modernize its draconian laws into ones that are not at odds with modern science).

316. IOWA CODE ANN. § 709D.3 (West 2015).

317. *Id.*



provision is therefore a tiered system that weighs different factors relative to the harm caused by either intentional or reckless acts.<sup>318</sup>

The provision outlines several defenses, including: (1) the act of becoming pregnant and continuing the pregnancy to term, and thereon declining treatment;<sup>319</sup> (2) for purposes of proving the intent to transmit the virus, it is not enough to have evidence that a person knew or should have known that he or she was HIV-positive and exposed others to the disease, regardless of the frequency of the conduct; (3) the fact that an HIV-positive person either informed his or her partner of an HIV-positive diagnosis or took preventive measures against transmission of the virus precludes the attribution of either the intent to transmit the virus or a reckless disregard for the life of another; and (4) previous knowledge by the complainant of the HIV status of the accused is explicitly categorized as an affirmative defense.<sup>320</sup> Florida may choose to adopt any of such defenses.

a. *HIV in Parity with Other Infectious Diseases*

One of the most important changes in the Iowa Code was that it brought HIV to parity with other infectious diseases.<sup>321</sup> In fact, section 709D.3 of the Iowa Code does not mention HIV at all and instead refers to a *contagious or infectious disease*.<sup>322</sup> This is noteworthy because it shows that in 2014, the Iowa Legislature made the opposite decision that the Florida Legislature made in 1997.<sup>323</sup> Recall from Part II that Florida has returned to section 384.24 of the Florida Statutes at various points in time, and in 1997, it did so in order to bifurcate the statute into parts (1) and (2) in order to separate HIV from other transmissible diseases.<sup>324</sup> Iowa did the reverse in

318. See *id.*; *HIV is Not a Crime*, *supra* note 312 (noting that the legislation “has converted sentencing to a tiered system instead of the one size fits all approach used in 709C.”).

319. See Khan, *supra* note 180, at 440–52 (discussing the repercussions of using the criminal law to prosecute expectant mothers with an emphasis on expanding legal protections for such women).

320. See IOWA CODE ANN. § 709D.3(5)–(8) (West 2015).

321. See *id.* § 709D.2 (defining “a [c]ontagious or infectious disease [a]s hepatitis in any form, meningococcal disease, AIDS or HIV as defined in section 141A.1, or tuberculosis.”).

322. See *id.* § 709D.3.

323. Compare Iowa Dep’t of Pub. Health, *supra* note 312 (detailing considerations by Iowa officials in reforming the Iowa Code in 2012), and IOWA CODE ANN. § 709D.3 (West 2015) (depicting the changes encoded into that came about to the Iowa Code from such reforms), with FLA. STAT. § 384.24 (1997), and Sections II.A, II.B (detailing how Florida changed its HIV-specific criminal provisions in 1997, making HIV transmission a third degree felony as opposed to a first degree misdemeanor).

324. See FLA. STAT. § 384.24 (1997); *supra* Sections II.A–B.



2014 and now defines a *contagious or infectious disease* as “hepatitis in any form, meningococcal disease, AIDS or HIV . . . or tuberculosis.”<sup>325</sup> This reform was a centerpiece of the new Iowa law, which stemmed widely from major criticisms on the lack of such parity in its former provisions.<sup>326</sup> Why segregate HIV from other potentially dangerous diseases? Various contagious diseases can pose a grave harm to the human body, and their intentional transmission is often not accounted for in the law.<sup>327</sup> Hepatitis, syphilis, and tuberculosis could all potentially pose grave harm when transmitted from one person to another.<sup>328</sup>

Florida treats HIV as if its transmission were a death sentence, modern science has made HIV a manageable chronic condition; the disease is no longer a death sentence if it is treated with proper medication.<sup>329</sup> Hepatitis C is more common than HIV, is highly communicable, and kills more people in the United States than the latter.<sup>330</sup> Human Papillomavirus, or HPV, can cause cervical and anal cancers, among other forms of cancer and also happens to be much more common than HIV.<sup>331</sup>

If Florida’s desire is to protect its citizens from the possible transmission of a viral infection that may potentially kill its host, then it is only logical for Florida to criminalize other similarly infectious diseases in parity with HIV under the law.<sup>332</sup> Section 384.34 of the Florida Statutes is

325. IOWA CODE ANN. § 709D.2(1) (West 2015).

326. See Iowa Dept. of Pub. Health, *supra* note 312 (pointing to authority in its recommendation to bring HIV to parity with other diseases: “The statute should avoid stigmatizing or singling out a specific disease, such as HIV, especially when there is currently very good evidence that the statutes do not change a person’s risk or disclosure behaviors (Burris, 2007),” while recognizing that there are other communicable diseases that should be treated in the same manner as HIV/AIDS in line with scientific knowledge).

327. See *id.*; Buchanan, *supra* note 34, at 1278–84 (discussing this point in detail while highlighting other diseases whose transmission often goes unpunished).

328. See Buchanan, *supra* note 34, at 1278–84.

329. See *HIV Treatment as Prevention*, *supra* note 152; *supra* Section III.B.2 (discussing the scientific advances that have made HIV/AIDS a chronic condition as opposed to a fatal disease).

330. Steven Reinberg, *Hepatitis C Now Kills More Americans Than HIV*, U.S. NEWS & WORLD REP. (Feb. 20, 2012, 5:00 PM), <http://health.usnews.com/health-news/news/articles/2012/02/20/hepatitis-c-now-kills-more-americans-than-hiv>; see also Buchanan, *supra* note 34, at 1280 (discussing hepatitis amongst other communicable diseases of concern that are often not criminalized at parity with HIV); FLA. STAT. § 384.24(a) (2015) (criminalizing several transmissible diseases while excluding Hepatitis C).

331. Buchanan, *supra* note 34, at 1281–84 (discussing communicable diseases of concern that are often not criminalized at parity with HIV).

332. See Iowa Dep’t of Pub. Health, *supra* note 312 (recognizing that there are other communicable diseases that should be treated in the same manner as HIV/AIDS in line with scientific knowledge); Buchanan, *supra* note 34, at 1278–84 (discussing communicable



underinclusive in terms of the diseases it aims to protect the public against; it is also unfairly bifurcated in two, stigmatizing HIV infection through segregation irrespective of modern science.<sup>333</sup> Florida can ameliorate this by collapsing HIV back into section 384.24(1), effectively ending its segregation from other sexually transmissible diseases as a condition worthy of more punishment than syphilis or genital herpes simplex.<sup>334</sup>

It is highly suggested that Florida consider thoroughly revisiting section 384.24(1), which lists various sexually transmissible diseases that section 384.34(1) specifies the transmission of to be a misdemeanor of the first degree.<sup>335</sup> The state should ensure that its provisions are backed by a current scientific understanding, as there may be other areas of concern within the statutory language worth reviewing. Notably, section 384.24(1) specifies that the transmission of *pelvic inflammatory disease* or *acute salpingitis* may result in a misdemeanor.<sup>336</sup> Pelvic inflammatory disease ("PID") is an infection of the female reproductive system that is often but not exclusively caused by sexually transmissible diseases, such as chlamydia and gonorrhea.<sup>337</sup> It is not transmitted from one partner to another in a manner akin to a virus.<sup>338</sup> Acute salpingitis is a narrower term that describes infection of the fallopian tubes.<sup>339</sup> PID is not a sexually transmissible disease.<sup>340</sup> Women cannot pass on PID onto men or other women.<sup>341</sup> PID is a serious inflammation of the female reproductive system that requires immediate treatment, as it may lead to serious complications, and this should not require incarceration.<sup>342</sup> Florida should strongly consider taking another

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diseases of concern that are often not criminalized at parity with HIV); *but cf.* FLA. STAT. § 384.24(2) (2015) (criminalizing only the transmission of HIV as a third degree felony).

333. FLA. STAT. § 384.24(1)–(2) (2015). The statute criminalizes only the transmission of HIV as a third-degree felony, while criminalizing other sexually transmissible diseases as a first-degree felony. *Id.* § 384.34. It also criminalizes several transmissible diseases while excluding Hepatitis C. *Id.* § 384.24(1).

334. FLA. STAT. § 387.24 (1997); *see also supra* Section II.A (discussing how Florida did the reverse in 1997, bifurcating the provision in two).

335. FLA. STAT. §§ 384.24(1), 34(1) (2015).

336. *Id.*

337. *Pelvic Inflammatory Disease (PID) — CDC Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/std/pid/stdfact-pid.htm> (last updated May 4, 2015).

338. *Pelvic Inflammatory Disease (PID)*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/learn/stds-hiv-safer-sex/pelvic-inflammatory-disease-pid> (last visited Feb. 8, 2016).

339. *See* FLA. STAT. § 389.24(2) (2015); *Pelvic Inflammatory Disease (PID)*, *supra* note 338.

340. *Pelvic Inflammatory Disease (PID)*, *supra* note 338.

341. *See id.*

342. *See id.*; FLA. STAT. § 384.24(2) (2015).



look into the medical science behind the conditions it aims to prevent the transmission of as listed in section 384.24 of the Florida Statutes.<sup>343</sup>

b. *HIV Transmission Taken into Account*

Currently, neither section 384.24 nor section 775.0877 of the Florida Statutes require actual transmission of HIV in order for the *criminal transmission of HIV* to take place.<sup>344</sup> In fact, the latter explicitly specifies that actual transmission is not required.<sup>345</sup> This is concerning, given that the specific intent to transmit is not a prerequisite under either of the two provisions.<sup>346</sup> Therefore, a person without the intent to transmit HIV, who did not in fact transmit HIV, and who knows of an HIV-positive diagnosis, may in fact be found guilty of a third-degree felony;<sup>347</sup> and if a pattern of conduct exists, such a person could face conviction of a first-degree felony.<sup>348</sup>

The Iowa Code takes transmission into account.<sup>349</sup> Therefore, even if the accused intended to transmit the virus, the offense would be more culpable under the law if actual transmission took place rather than when no transmission took place.<sup>350</sup> The same is true for reckless acts under the Iowa Code that lack the specific intent to transmit any of the diseases listed.<sup>351</sup> Florida should take HIV transmission into account, as well as the relative potential of the particular conduct in transmitting the virus under the circumstances.<sup>352</sup> Advances in science have made it unlikely that there will be transmission of HIV when parties engaged in sexual conduct take certain precautions.<sup>353</sup> Florida should recognize such realities.

343. See FLA. STAT. § 384.24 (2015).

344. See *id.* §§ 384.24(2), 775.0877(5).

345. See FLA. STAT. § 775.0877(5) (2015).

346. See *id.* §§ 384.24(2), 775.0877(5).

347. See *id.* §§ 384.34(5), 775.0877(3).

348. See *id.* § 384.34(5).

349. See IOWA CODE § 709D.3 (West 2015).

350. *Id.*

351. *Id.*

352. See Elliot, *supra* note 201, at 8, 15; *supra* Section IV.A.1 (discussing instances of prosecutions for HIV transmission where such transmission could not have taken place and how applicable criminal provisions in Florida facilitate these prosecutions).

353. See Buchanan, *supra* note 34, at 1241–43 (commenting on the public health critique behind a lack of recognition of such advances by the criminal law); *supra* Section III.B (discussing such advances in preventive means against HIV transmission).



B. *On An Alternative to a Punitive State*

Instead of engaging in the prosecution of PLWHA, the State of Florida should take an evidence-based public health approach to the epidemic. Funding for HIV/AIDS research is necessary in order to combat this epidemic.<sup>354</sup> Ongoing research in the medical field to promote a search for a vaccine, a cure, or to create more evidence-based intervention programs will certainly help Florida to combat HIV transmission;<sup>355</sup> but a comprehensive prevention campaign utilizing the resources that we already have is also needed in Florida to combat the spread of HIV.<sup>356</sup>

Florida Governor Rick Scott recently provided the University of Miami with a million dollar grant to fund HIV/AIDS research, as part of the 2014–2015 Florida Budget.<sup>357</sup> In the governor's own words at the University of Miami, he said:

"Funding research to cure the horrible diseases that afflict our loved ones has to be one of our top priorities. One of the nice things to happen in our state in the last four years is that we have turned our economy around. So as our economy gets better, we have more money in the budget, and we can do more things. Healthcare is clearly one of them. We must work together to treat these complex diseases, which require much more research and development."<sup>358</sup>

The governor was praised for retaining funding on the 2012–2013 Florida Budget for the AIDS Drug Assistance Program ("ADAP") on a recurring fund for 2.5 million dollars.<sup>359</sup> This funding is crucial, as it forms a part of the money available to PLWHA under the Ryan White laws when they cannot afford their medications, and while this program is already largely funded by the federal government, state funds are necessary in order for it to function adequately.<sup>360</sup> Together, the funds of both the state and

354. See *\$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research*, U. MIAMI (Sept. 24, 2014), <http://med.miami.edu/news/1-million-grant-from-state-of-florida-will-support-um-hiv-aids-research>.

355. See *id.* (highlighting the importance of medical research for HIV/AIDS).

356. *Id.*

357. *Id.*

358. *Id.*

359. Press Release, The AIDS Inst., The AIDS Inst. Praises Fla. Governor Rick Scott & Legislature for Increased Funding to AIDS Drug Assistance Program Will Help Alleviate Long Wait List to Receive Medications (Apr. 30, 2012), <http://www.theaidsinstitute.org/sites/default/files/attachments/floridaadapstatebudget.pdf>.

360. ADAP Premium Plus: Understanding Your Health Insurance Options, FLORIDAHEALTH.GOV 3–6, <http://www.floridahealth.gov/diseases-and-conditions/aids/adap/>



federal governments combine in order to provide low-income individuals who do not have the means to pay for HIV medications the financial means to do so.<sup>361</sup> At one point before the governor signed this budget, Florida had an extensive wait list of over four thousand people who could not pay for their medications.<sup>362</sup>

The preceding paragraph highlights the importance of state funding in order to ensure the wellbeing of PLWHA. If it is that the economy truly has improved as the governor states, and Florida truly has more available funds in its state budget as a result, then the governor and the Florida Legislature should adopt a comprehensive prevention plan to combat the transmission of HIV in Florida.<sup>363</sup> Below is a set of statistics that highlight the dire need for the launch of such a comprehensive campaign, followed by a model that Florida may use in both developing and implementing such a campaign.

## 1. Statistics

### a. Florida and Miami-Dade County

Florida's HIV infection rate is not decreasing.<sup>364</sup> Official estimates by the Florida Department of Health places the transmission rate of HIV for the entire State of Florida in 2014 at 31.4, up from 28.3.<sup>365</sup> This translates to 6147 total new infections in 2014, as opposed to a total of 5467 infections in 2013.<sup>366</sup> From 2009 to 2013, the incidence of new transmissions had not risen above 6000 per year.<sup>367</sup> While the population in Florida has been

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documents/understanding-your-health-insurance-options-9-22.pdf (last visited Feb. 8, 2016); see also Ryan White Comprehensive AIDS Resources Emergency Act of 1990, Pub. L. No. 103-38, § 2647, 104 Stat. 576, 603 (1990).

361. Press Release, The AIDS Inst., *supra* note 359.

362. *Id.*

363. See \$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research, *supra* note 354 ("[W]e have turned our economy around. So as our economy gets better, we have more money in the budget, and we can do more things. Healthcare is clearly one of them. We must work together to treat these complex diseases . . .").

364. *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, FLORIDAHEALTH.GOV (Dec. 4, 2014), [http://www.floridahealth.gov/diseases-and-conditions/aids/surveillance/\\_documents/HIV-AIDS-slide-sets/2014/state-trends-2014.pdf](http://www.floridahealth.gov/diseases-and-conditions/aids/surveillance/_documents/HIV-AIDS-slide-sets/2014/state-trends-2014.pdf).

365. *Id.* All transmission rates are consistently referred to as per every hundred thousand individuals. *Id.*

366. *Id.*

367. *Id.*



steadily growing, the rate of transmission in 2009 was lower than in 2014—at 29.5 as opposed to 31.4.<sup>368</sup>

Miami-Dade County suffers from one of the highest HIV/AIDS transmission rates in the nation, much higher than the State of Florida's combined HIV transmission rate;<sup>369</sup> The metropolitan area also suffers from a similar problem to Florida's problem in that its HIV transmission rate is not decreasing.<sup>370</sup> In fact, just as with the trend in the state as a whole, 2013 saw the highest transmission rate since 2009 for Miami-Dade County at 55.6.<sup>371</sup> Contrast this with a transmission rate of 53.2 in 2009.<sup>372</sup>

A sharp downturn can be observed in HIV transmission rates between 2008 and 2009 across the country due to the quicker initiation of ART, particularly as implemented at the moment of HIV-positive diagnosis as opposed to later on during the progression of the disease.<sup>373</sup> Such a decrease in transmission rates due to better ART is evidence that proper treatment, along with the implementation of HIV prevention strategies, can reduce transmission rates across the board.<sup>374</sup>

b. *San Francisco*

San Francisco is important because its HIV transmission rate has traditionally been very high, similar in light to that of Miami-Dade County's and also because it has become a center for innovation in the implementation of interventions geared at lessening HIV transmission.<sup>375</sup> In absolutes, the number of new infections do not seem very high for the City and County of

368. *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364.

369. *Id.*; \$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research, *supra* note 354.

370. \$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research, *supra* note 354; see also *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364; HIV/AIDS Epidemiology Partnership 11a, FLORIDAHEALTH.GOV (Jan. 2, 2014), [http://www.floridahealth.gov/diseases-and-conditions/aids/surveillance/\\_documents/partnership-slide-sets/part11a-13.pdf](http://www.floridahealth.gov/diseases-and-conditions/aids/surveillance/_documents/partnership-slide-sets/part11a-13.pdf).

371. HIV/AIDS Epidemiology Partnership 11a, *supra* note 370.

372. *Id.*

373. See Dana P. Goldman et al., *Early HIV Treatment in the United States Prevented Nearly 13,500 Infections Per Year During 1996–2009*, 33 HEALTH AFF. 362, 364–65 (2014) (finding that early ART treatment within that period also reduced HIV transmission rates); HIV/AIDS Epidemiology Partnership 11a, *supra* note 370.

374. See Goldman et al., *supra* note 373, at 364–65.

375. See *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364; HIV/AIDS Epidemiology Partnership 11a, *supra* note 370; S.F. DEP'T OF PUB. HEALTH, HIV EPIDEMIOLOGY ANNUAL REPORT 1–3 (2013), <http://www.sfdph.org/dph/files/reports/RptsHIVAIDS/HIVAIDAnnRpt2013.pdf>.



San Francisco; for example, in 2008, there were 515 new cases of HIV within the city, and in 2009, there was a decrease to 463.<sup>376</sup> However, the proportion of new HIV cases in relation to the total population for San Francisco is analogous to Miami-Dade's.<sup>377</sup> San Francisco had an HIV transmission rate of 63.74 in 2008 and 56.78 in 2009.<sup>378</sup> The HIV transmission rates in Miami-Dade County for the same period were 71.1 and 53.2, respectively.<sup>379</sup>

The statistics above show that Miami-Dade County and San Francisco are both affected by high HIV transmission rates.<sup>380</sup> But in the years following 2009, San Francisco has utilized its resources to decrease the proliferation of the epidemic through effective prevention strategies, and its HIV transmission rate has been declining while Miami-Dade County's has at best remained stagnant.<sup>381</sup> In 2013, San Francisco had only 359 new cases of HIV, which translates to a transmission rate of 42.87.<sup>382</sup> Miami-Dade was still at a transmission rate of 55.6 for 2013—and has recently been named the

376. S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3.

377. See *HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370; S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3–4, 8.

378. See U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR COUNTIES OF CALIFORNIA: APRIL 1, 2000 TO JULY 1, 2009 2 (Mar. 2010), <http://www.census.gov/popest/data/counties/totals/2009/CO-EST2009-01.html> (follow "XLS" link under "California"); *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364. The San Francisco Department of Public Health does not publish transmission rates. See S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3–4. HIV transmission rates are yielded per 100,000 with the simple formula: number of cases in a specified time / population at that time  $\times$  100,000 = rate. *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364. Utilizing the formula and data by the U.S. Census Bureau, the transmission rate for San Francisco is easily ascertainable. See U.S. CENSUS BUREAU, *supra*, at 2; *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364. The population of San Francisco in 2008 was approximately 808,001, while the population in 2009 was approximately 815,358. U.S. CENSUS BUREAU, *supra*, at 2; *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364.  $515 / 808,001 \times 100,000 = 63.74$ ; and  $463 / 815,358 \times 100,000 = 56.78$ . See U.S. CENSUS BUREAU, *supra*, at 2; *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364; S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3–4.

379. *HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370.

380. See *id.*; S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3–4, 8.

381. See *HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370; S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 2–4 (depicting a declining number of cases within the 2009–2013 period with a minute spike in 2012).

382. S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3; see also *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364. The population of San Francisco in 2013 was approximately 837,442. *San Francisco County QuickFacts from the U.S. Census Bureau*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06/06075.html> (last updated May 28, 2015).  $359 / 837,442 \times 100,000 = 42.87$ . See *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364; S.F. DEP'T OF PUB. HEALTH, *supra* note 375, at 3.



number one place in the nation for new HIV infections per 100,000 residents in 2014, with Broward County closely behind in second place.<sup>383</sup> With the official epidemiology report for 2014 released, San Francisco city officials reported an 18% drop in the transmission rate from 2013 to 2014.<sup>384</sup> The following subsection will explore the programs that the City and County of San Francisco has set in place in order to combat the HIV/AIDS epidemic—in hopes that Florida may encourage or adopt a more proactive approach to addressing HIV transmission.<sup>385</sup>

## 2. Proactive Programs to End HIV/AIDS

### a. San Francisco and Getting to Zero

As per the San Francisco Department of Public Health (“S.F. DPH”), the mission statement of the “*Getting to Zero*” in San Francisco project is to:

Coordinate a strategic plan to get San Francisco to zero new HIV infections, zero HIV-associated deaths and zero stigma [through]: (1) [c]onvey[ing] a sense of urgency and possibility among San Franciscans; (2) [c]mpower[ing] and engag[ing] a broad diversity of stakeholders and creat[ing] shared responsibility for achieving the vision; (3) [c]reat[ing] communication and coordination

383. *HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370; Steve Bousquet & Michael Auslen, *Florida Leads U.S. in New HIV Cases After Years of Cuts in Public Health*, MIAMI HERALD (Jan. 22, 2016, 9:08 PM), <http://www.miamiherald.com/news/state/florida/article56192770.html> (detailing the negative effects that cuts on public health programs targeting HIV/AIDS have had on Florida’s HIV transmission rate during Gover Rick Scott’s time in office).

384. Chris Roberts, *SF Records All-Time Low in HIV Infections, Deaths*, S.F. EXAMINER (July 6, 2015, 10:11 PM), <http://www.sfexaminer.com/sf-records-all-time-low-in-hiv-infections-deaths>. Note that the statistics are adjusted from year to year and vary slightly within both the Florida Department of Health and the San Francisco Department of Public Health estimates, but the trends are consistent. See *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364; S.F. DEP’T OF PUB. HEALTH, *supra* note 375, at 3. A slight difference in numbers yields slightly different HIV transmission rates. See *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364; S.F. DEP’T OF PUB. HEALTH, *supra* note 375, at 3. San Francisco is reporting 371 new cases of HIV for 2013 within updated numbers for 2014 pending an official report. “*Getting to Zero*” in *San Francisco Consortium: Zero New HIV Infections, Zero HIV Deaths, Zero Stigma, and Discrimination*, GETTING TO ZERO S.F., <http://www.sfdph.org/dph/files/hc/HCAgen/n%20to%20MM.pdf> (last visited Feb. 8, 2016); see also S.F. DEP’T OF PUB. HEALTH, *supra* note 375, at 3. That number was estimated at 359 for the same period within the 2013 official report. S.F. DEP’T OF PUB. HEALTH, *supra* note 375, at 3.

385. See *infra* Section IV.B.2.



amongst the various stakeholders to implement the strategic plan; (4) [m]obiliz[ing] all necessary resources to achieve the vision; (5) [d]evelop[ing] robust metrics, and report[ing] progress annually on World AIDS Day; [and] (6) [a]chiev[ing] this vision by ensuring the health and wellness of individuals and communities living with HIV and at risk for HIV.<sup>386</sup>

The vision in San Francisco is advanced by a number of intertwined actors, which includes but is not limited to: (1) the City and County of San Francisco; (2) the S.F. DPH; (3) many local health care providers; and (4) institutions of higher learning, such as the University of California San Francisco ("UCSF").<sup>387</sup> The goals of the project are achieved through three main venues: (1) the expansion of ART; (2) the promotion of Truvada as PrEP; and (3) an increase in patient retention rates for people living with HIV/AIDS.<sup>388</sup>

A significant amount of the effort is centered on providing quick and comprehensive treatment to those recently diagnosed with HIV.<sup>389</sup> This begins at the moment of diagnosis through a system called rapid antiretroviral program initiative for new diagnoses ART ("RAPID ART")—consisting of making essential medications available to ensure the initiation of ART immediately.<sup>390</sup> Such a system aims to remove logistical problems traditionally associated with the initiation of treatment; problems that would otherwise only exacerbate the epidemic given because of delays in treatment implementation.<sup>391</sup> The decline in HIV transmission rates that has been seen across the nation is due to quick implementations of ARTs and is evidence as to the effectiveness of such programs—and San Francisco is attempting to remove all barriers between patients and treatment providers in order to quickly reduce the viral load.<sup>392</sup> The delivery of RAPID ART helps in

386. Susan Buchbinder, "Getting to Zero" in San Francisco: Zero HIV Infections, Zero HIV Deaths, Zero HIV Stigma, S.F. DEP'T PUB. HEALTH, <http://www.sfdph.org/dph/files/sfchip/GettingToZero-HIV.pdf> (last visited Feb. 8, 2016).

387. See *id.*

388. See *id.*

389. See Russell Sabin, *City Endorses New Policy for Treatment of H.I.V.*, N.Y. TIMES, Apr. 4, 2010, at A25.

390. Mehroz Baig, *How San Francisco Is Getting to Zero on HIV*, HUFFINGTON POST (Dec. 10, 2014, 11:31 AM), [http://www.huffingtonpost.com/mehroz-baig/how-san-francisco-is-getting-to-zero-on-hiv\\_b\\_6290636.html](http://www.huffingtonpost.com/mehroz-baig/how-san-francisco-is-getting-to-zero-on-hiv_b_6290636.html); see also Buchbinder, *supra* note 386; *Heroes in the Flight: Meet Hiroyu*, S.F. AIDS FOUND., <http://staf.org/hiv-info/hot-topics/from-the-experts/heroes-in-the-flight-meet-3.html> (last visited Feb. 8, 2016).

391. See Baig, *supra* note 390.

392. See *id.*; Grant Colfax, *Moving Towards Reduced HIV Incidence: How the San Francisco Experience Can Inform National HIV/AIDS Strategy Implementation*, S.F.



quickly reducing the viral load to undetectable levels, which in effect reduces the probability that more people will become infected with the virus.<sup>393</sup>

In line with the delivery of RAPID ART programs to the newly diagnosed, San Francisco is attempting to increase its patient retention rate.<sup>394</sup> This is the proportion of people living with HIV who remain under medical programs while taking ART medications.<sup>395</sup> The discontinuation of medication, even in the short term, can lead to an increase in the viral load in the blood of PLWHA, which in turn exacerbates the transmission rate of the disease.<sup>396</sup> Statistics show that San Francisco is achieving a much higher retention rate than Miami-Dade and Washington, D.C.—both of which are disproportionately affected by similarly high HIV transmission rates.<sup>397</sup>

Additionally, the City and County of San Francisco has implemented mental health programs, housing assistance, patient engagement initiatives, substance abuse treatment programs, and treatment adherence into its retention efforts.<sup>398</sup> Such efforts include hiring public health workers to engage in door-to-door efforts to ensure that patients have access to their medications and are adhering to their medical provider's recommendations.<sup>399</sup> San Francisco's advanced system of HIV surveillance takes into account the spatial distribution of the virus in the most affected

DEP'T PUB. HEALTH, <http://www.uchaps.org/assets/DrColfaxHHS.pdf> (last visited Feb. 8, 2016); *Viral Load*, *supra* note 150.

393. *Viral Load*, *supra* note 150; see also Buchbinder, *supra* note 386.

394. Baig, *supra* note 390; Buchbinder, *supra* note 386.

395. See Baig, *supra* note 390 (detailing how San Francisco plans to increase its retention rate under *Retention*).

396. *Guidelines for the Use of Antiretroviral Agents in HIV-1-Infected Adults and Adolescents*, AIDSINFO, [http://aidsinfo.nih.gov/contentfiles/lvguidelines/glcchunk/glcchunk\\_18.pdf](http://aidsinfo.nih.gov/contentfiles/lvguidelines/glcchunk/glcchunk_18.pdf) (last updated Apr. 8, 2015).

397. See Buchbinder, *supra* note 386; Colfax, *supra* note 392; *HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370.

398. See Colfax, *supra* note 392.

399. See *How San Francisco Plans to 'Get to Zero' New Infections of HIV*, PBS (Apr. 11, 2015, 11:40 AM), <http://www.pbs.org/newshour/bb/san-francisco-plans-get-zero-new-infections-hiv>. The transcript of a PBS news report depicts how a San Francisco Public Health worker implements the *Getting to Zero* effort:

JOHN CARLOS FREY: We followed social worker Sandra Torres on the bus as she checked up on a few patients who needed extra help keeping up with their appointments. She and other social workers are continually tracking people down.

SANDRA TORRES: We're going to knock on the door. JOHN CARLOS FREY: In the gritty Tenderloin district we went to a single-room occupancy hotel where an HIV positive patient was staying. He's an intravenous drug user and not taking medication.

SANDRA TORRES: Hi Honey, how you doing? JOHN CARLOS FREY: Torres dropped off an appointment reminder and I asked her about the patient afterward.

JOHN CARLOS FREY: It seems like an enormous effort for one person. SANDRA TORRES: That's what it's gonna take, though. That is absolutely what it's gonna take.



communities in order to better address treatment and prevention by placing its emphasis and resources on the areas with the highest need.<sup>400</sup>

The last crucial centerpiece of the Getting to Zero project is the expansion of Truvada as PrEP amongst the general public with a particular emphasis on high-risk populations, such as MSM and intravenous drug users.<sup>401</sup> The concept is simple: Truvada works, and it is extremely effective when used consistently to decrease HIV infection.<sup>402</sup> Therefore, the expanded use of Truvada as PrEP must be made available to those at an increased risk of infection, given that it can substantially reduce the rate of HIV transmission.<sup>403</sup> The use of Truvada as PrEP is predicted to have the ability to substantially decrease HIV transmission rates by 70% for the city in the coming years if San Francisco can achieve a 75% increase in Truvada usage as PrEP.<sup>404</sup> San Francisco's efforts have created an increase in the demand for Truvada, yet barriers to its use amongst high-risk groups remain—ranging from the high costs of the medication to a lack of awareness about the drug.<sup>405</sup> However, the city's efforts have culminated in a higher number of referrals and a general increase in the usage of the drug.<sup>406</sup> Most insurance plans now cover Truvada as PrEP in one form or another—ranging from full coverage to different types of co-payment options.<sup>407</sup>

#### b. *How the State of Florida Can Help*

The State of Florida can help fund initiatives that incorporate state agencies, such as the incorporation of the Florida Department of Health, in a robust campaign aimed at reducing HIV transmission with initiatives similar to those currently being implemented in San Francisco.<sup>408</sup> The state must work directly with hospitals, universities, and other state and federal agencies in order to implement its prevention strategies. Through the

400. See Colfax, *supra* note 392.

401. See Baig, *supra* note 390; Buchbinder, *supra* note 386.

402. Buchbinder, *supra* note 386; *How San Francisco Plans to 'Get to Zero' New Infections of HIV*, *supra* note 399.

403. See *How San Francisco Plans to 'Get to Zero' New Infections of HIV*, *supra* note 399.

404. See Mark Mascolini, *Wider PrEP Use in San Francisco Could Cut New HIV Rate by 70%*, NATAP, [http://www.natap.org/2015/CROI/croi\\_08.htm](http://www.natap.org/2015/CROI/croi_08.htm) (last visited Feb. 8, 2016).

405. See *How San Francisco Plans to 'Get to Zero' New Infections of HIV*, *supra* note 399.

406. See Buchbinder, *supra* note 386.

407. *Id.*

408. See *About Test Miami*, TEST MIAMI, <http://www.testmiami.org/EN-About-Us> (last visited Feb. 8, 2016); Baig, *supra* note 390.



National HIV/AIDS Strategy, the federal government has funded various programs in Miami-Dade County, including interventions under its Enhanced Comprehensive HIV Prevention Planning and its subsequent Twelve Cities Project.<sup>409</sup> The state and local governments can implement cohesive strategies in ways that the federal government is simply not situated to implement.<sup>410</sup> Local hospitals, universities, and the Florida Department of Health can collaborate to bring RAPID ART to patients, expand Truvada as PrEP for at-risk persons, and ensure medical retention in areas that have a high HIV transmission rate, such as Miami-Dade County.<sup>411</sup> Such a combination of actors is also better situated to utilize its HIV surveillance data to reduce the community viral load in specific cities and jurisdictions where it is known that viral transmission has surpassed the average rate of infection for the state.<sup>412</sup>

The State of Florida should direct the Florida Department of Health so that it may reconstruct its prevention campaign in a more proactive manner.<sup>413</sup> Rather than responding to patients seeking medical services, the state should engage in a more pragmatic approach to the HIV/AIDS epidemic through the collaboration of many stakeholders in the community, ensuring the adequate allocation of its resources.<sup>414</sup> The legislature can amend section 381.0046 of the Florida Statutes to include such a vision.<sup>415</sup> The provision currently reads as follows:

(1) The Department of Health shall develop and implement a statewide HIV and AIDS prevention campaign that is directed towards minorities who are at risk of HIV infection. The campaign shall include television, radio, and outdoor advertising; public service announcements; and peer-to-peer outreach. Each campaign message and concept shall be evaluated with members

409. *Enhanced Comprehensive HIV Prevention Planning and Implementation for Metropolitan Statistical Areas Most Affected by HIV/AIDS*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/hiv/prevention/demonstration/echpp> (last updated Apr. 19, 2013). These are efforts by the federal government under its National HIV/AIDS strategy in order to improve its understanding of the HIV/AIDS epidemic in selected areas and better implement interventions to help combat the disease. *Id.*

410. *See id.*; *supra* Section IV.B.2.a (demonstrating how the local government in San Francisco can make a difference by launching a comprehensive prevention campaign).

411. *See About Test Miami*, *supra* note 408; *supra* Section IV.B.2.a (depicting how San Francisco coordinates *Getting to Zero*).

412. *See About Test Miami*, *supra* note 408; Buchbinder, *supra* note 386; *supra* Section IV.B.2.a (depicting how San Francisco coordinates *Getting to Zero*).

413. *See About Test Miami*, *supra* note 408.

414. *See* FLA. STAT. § 381.0046 (2014); Buchbinder, *supra* note 386; *supra* Section IV.B.2.a (depicting how San Francisco coordinates *Getting to Zero*).

415. *See* FLA. STAT. § 381.004.



of the target group to ensure its effectiveness. The campaign shall provide information on the risk of HIV and AIDS infection and strategies to follow for prevention, early detection, and treatment. The campaign shall use culturally sensitive literature and educational materials and promote the development of individual skills for behavior modification. (2) The Department of Health shall establish dedicated positions within the department for HIV and AIDS regional minority coordinators and a statewide HIV and AIDS minority coordinator. The coordinators shall facilitate statewide efforts to implement and coordinate HIV and AIDS prevention and treatment programs.<sup>416</sup>

An amendment should be in addition to, rather than in substitution of, the language already found in the provision above.<sup>417</sup> It can be done with a simple addition of a third point directing the Florida Department of Health to: (a) work with other entities in the community in order to deliver the latest advances known in medicine to HIV/AIDS patients; (b) inclusive of all methods of prevention against HIV transmission—provided to both existing HIV patients and members of high-risk populations in need of such services; (c) while encouraging patient retention.<sup>418</sup> Such a change in the law would add a whole new direction to the fight against HIV/AIDS in Florida, marking a new phase its public health campaign against its proliferation.<sup>419</sup> In fact, the provision as it stands today is titled *Statewide HIV and AIDS Prevention Campaign*, and it is about time that such *campaign* live up to its and reflect a much more pragmatic effort in Florida aimed at the prevention of HIV transmission.<sup>420</sup>

Florida can become a pioneer in the fight against HIV/AIDS by proving to the world that it too can strive to get to “zero new HIV infections, zero HIV-associated deaths, and zero stigma,” as does the City and County of San Francisco.<sup>421</sup> Much of the groundwork has already been set by efforts from the state and federal governments, along with private actors such as organizations devoted to the prevention and treatment of HIV/AIDS.<sup>422</sup> It is

416. *Id.*

417. *See id.*

418. *See* Buchbinder, *supra* note 386 (recommendations mirror the “Getting to Zero” campaign); *supra* Section IV.B.2.a (depicting how San Francisco coordinates “Getting to Zero”).

419. *See* FLA. STAT. § 381.0046 (2015); *supra* Section IV.B.2.a (depicting how San Francisco coordinates “Getting to Zero”).

420. *See* FLA. STAT. § 381.0046 (2015).

421. *See* Buchbinder, *supra* note 386; *supra* Section IV.B.2.a (depicting how San Francisco coordinates “Getting to Zero”).

422. *See* *About the Ryan White HIV/AIDS Program*, *supra* note 139 (noting how the Ryan White CARE act has funded programs throughout the states in order



about time that all parties in Florida work together rather than in isolation from each other in order to deliver a public health campaign that can truly make a difference in the spread of the HIV/AIDS epidemic.<sup>423</sup>

c. *More Funding Necessary*

A proactive campaign to fight HIV transmission in Florida similar to San Francisco's campaign, will require additional funding.<sup>424</sup> Funding for such initiatives in California can be found in both the California state budget and the San Francisco budget.<sup>425</sup> For example, the 2015–2016 California State Budget includes the following:

- (1) The Budget contains [three] million [dollars] General Fund ongoing for a syringe exchange program that will allow for the statewide purchasing of syringe disposal containers, sterile syringes, and other materials to be used by local health departments and community-based organizations to reduce the transmission of bloodborne pathogens such as HIV and Hepatitis C. . . . (2) The Budget provides [two] million [dollars] General Fund ongoing for Pre-Exposure Prophylaxis outreach and education pilot programs. These programs are intended to reduce new HIV infections for uninsured and underinsured at-risk

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to provide services to those in need); *About Test Miami*, *supra* note 408. Efforts exist in South Florida to stop the spread of HIV, for example, Test Miami describes itself as:

The "Test Miami" Initiative is an unprecedented collaborative effort between the Miami-Dade County Health Department and Florida Department of Health, HIV counselors, community-based organizations, private and public sector, faith-based organizations, health care providers, University of Miami Developmental Center for AIDS Research, Florida International University School of Public Health and the School of Journalism, Nova Southeastern University, Emory University Rollins School of Public Health, city, county, state and national officials and concerned citizens that aims to: (1) Promote routine HIV testing by physicians; (2) Improve Miami-Dade residents' understanding of HIV; [and] (3) Reduce the transmission of HIV.

*About Test Miami*, *supra* note 408.

423. See *About Test Miami*, *supra* note 408; Press Release, The Aids Inst., *supra* note 359; \$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research, *supra* note 354.

424. See Press Release, The Aids Inst., *supra* note 359; MAYOR'S 2015–2016 & 2016–2017 PROPOSED BUDGET, MAYOR EDWIN M. LEE, CITY & COUNTY OF SAN FRANCISCO, CALIFORNIA 14 (2015), [http://sfmayor.org/ftp/uploadedfiles/mayor/budget/Budget\\_Book\\_fy\\_2015\\_16\\_and\\_2016\\_17\\_Final\\_web.pdf](http://sfmayor.org/ftp/uploadedfiles/mayor/budget/Budget_Book_fy_2015_16_and_2016_17_Final_web.pdf) [hereinafter SAN FRANCISCO MAYOR'S PROPOSED BUDGET].

425. See CALIFORNIA 2015–16 STATE BUDGET 31 (2015), <http://www.dof.ca.gov/documents/FullBudgetSummary-2015.pdf>; SAN FRANCISCO MAYOR'S PROPOSED BUDGET, *supra* note 424, at 14.



individuals who are in communities experiencing significant increases in new HIV infections.<sup>426</sup>

As can be appreciated from the text above, the state budget sets aside three million dollars for its intravenous drug user program and two million dollars for the expansion of PrEP outreach and education throughout the state.<sup>427</sup> The San Francisco 2015–2016 Budget is also very ambitious, setting aside “[two] million [dollars] in new funding to continue San Francisco’s leadership in the fight against [HIV/AIDS] for the *Getting to Zero* initiative, which focuses on achieving zero new HIV Infections, zero AIDS deaths, and zero stigma.”<sup>428</sup>

While it is laudable that Florida Governor Rick Scott approved 2.5 million dollars to keep the ADAP program running back in 2012 and provided a one million dollar grant to the University of Miami more recently in 2014, this is insufficient to counteract the high HIV/AIDS transmission rates in Florida—the Florida state budget desperately needs a comprehensive HIV/AIDS funding package to launch a large prevention campaign against HIV transmission.<sup>429</sup> The University of Miami is an isolated entity that cannot on its own solve the widespread problem Florida has in its ever-present need to control the spread of HIV.<sup>430</sup>

Florida Governor Rick Scott proposed and set aside a specific grant in 2014 for “high-impact HIV prevention [in] Orange County.”<sup>431</sup> But his recommendation was absent for 2015.<sup>432</sup> Other than consistent funding for ADAP, which is very crucial funding, HIV/AIDS funding in Florida reveals a lack of cohesiveness.<sup>433</sup> There is no HIV/AIDS prevention plan such as *Getting to Zero* or any funding specifically encouraging the usage of Truvada

426. CALIFORNIA 2015–16 STATE BUDGET, *supra* note 425, at 31.

427. *Id.*

428. SAN FRANCISCO MAYOR’S PROPOSED BUDGET, *supra* note 424, at 14.

429. Press Release, The Aids Inst., *supra* note 359; \$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research, *supra* note 354.

430. See \$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research, *supra* note 354; Press Release, The Aids Inst., *supra* note 359.

431. Community Public Health (Program); County Health Departments Local Health Needs, KEEP FLA. WORKING, [http://www.keepfloridaworking.com/web%20forms/Budget/BudgetServiceIssueList.aspx?rid1=237141&rid2=207272&si=64200700&title=COMMUNITY%20PUBLIC%20HEALTH%20\(Program\);COUNTY%20HEALTH%20DEPARTMENTS%20LOCAL%20HEALTH%20NEEDS](http://www.keepfloridaworking.com/web%20forms/Budget/BudgetServiceIssueList.aspx?rid1=237141&rid2=207272&si=64200700&title=COMMUNITY%20PUBLIC%20HEALTH%20(Program);COUNTY%20HEALTH%20DEPARTMENTS%20LOCAL%20HEALTH%20NEEDS) (last visited Feb. 8, 2016).

432. See *id.*

433. See *id.* The governor has not recommended ADAP funding for 2015, and has been consistent in the absence of a recommendation to do so despite actual approval of funds for the program. \$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research, *supra* note 354.



as PrEP.<sup>434</sup> Florida needs to set aside a specific fund for ongoing and robust HIV-prevention programs.<sup>435</sup> The HIV transmission rate in Florida is not decreasing, and several highly populated areas within Florida, such as Miami-Dade County, Broward County and Orange County, suffer disproportionately from some of the highest HIV transmission rates in this nation.<sup>436</sup>

### 3. Expanding Educational Bounds

#### a. *Comprehensive HIV/AIDS Education for the Youth*

The Florida Department of Health statistics accurately reflect a need for immediate intervention; there has been an increase in HIV transmission from 2008 onward in the proportion of people newly diagnosed with HIV within the age range of twenty through twenty-nine.<sup>437</sup> In 2008, around 20% of people newly diagnosed with HIV that year were in the age range of twenty through twenty-nine, as opposed to in 2014, when the number for people in that age range had risen closer to 30% of all newly diagnosed HIV cases.<sup>438</sup> These are not just isolated percentages—an upward trend can clearly be seen in the statistics released from year-to-year.<sup>439</sup> The same is true for Miami-Dade County, where the jump in numbers relating to new HIV infections from 2008 to 2014 steadily increased from the early teens to the late twenties in terms of percentages, marking a clear exacerbation of the HIV transmission rate amongst people within the age range of twenty through twenty-nine.<sup>440</sup>

The statistics above are concerning because they show that people in Florida are being diagnosed with HIV at relatively younger ages than in

434. *Community Public Health (Program); County Health Departments Local Health Needs*, *supra* note 431; *\$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research*, *supra* note 354; *see also* Buchbinder, *supra* note 386.

435. *See* Buchbinder, *supra* note 386; *Community Public Health (Program); County Health Departments Local Health Needs*, *supra* note 431.

436. *\$1 Million Grant from State of Florida Will Support UM HIV/AIDS Research*, *supra* note 354; *see also* Bousquet & Auslen, *supra* note 383 (emphasizing the damage that Governor Rick Scott's budget cuts on HIV/AIDS public health funds have caused on both the State of Florida as a whole and on the areas most affected by the HIV/AIDS epidemic, such as Miami-Dade and Broward counties). *Compare Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364, with *HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370.

437. *See Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364.

438. *Id.*

439. *Id.*

440. *See HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370.



previous decades.<sup>441</sup> Therefore, it is crucial that Florida provide the youth with comprehensive sexual education throughout its public school system in order to reduce the transmission of the disease within this age group.<sup>442</sup> Empowering students with knowledge of the disease and methods of prevention are necessary so that young people can understand how HIV is transmitted and how to prevent infection.<sup>443</sup> Section 1003.46 of the Florida Statutes is on point and reads as follows:

(1) Each district school board may provide instruction in acquired immune deficiency syndrome education as a specific area of health education. Such instruction may include . . . the known modes of transmission, signs and symptoms, risk factors associated with acquired immune deficiency syndrome, and means used to control the spread of acquired immune deficiency syndrome . . . (2) a school shall: (a) Teach abstinence from sexual activity outside of marriage . . . while teaching the benefits of monogamous heterosexual marriage; (b) [e]mphasize . . . abstinence; . . . (c) [t]each that each student has the power to control personal behavior and; . . . (d) [p]rovide instruction and material that is appropriate for the grade and age of the student.<sup>444</sup>

The instruction provided to students in Florida does not adequately address the HIV epidemic.<sup>445</sup> Instead, it focuses on an ideological paradigm emphasizing *abstinence* and *heterosexual marriage*.<sup>446</sup> But the fact is MSM are disproportionately affected by HIV transmission, and their explicit exclusion from educational instruction effectively negates addressing this reality in schools across the state.<sup>447</sup> The Florida provision implies that monogamous same-sex marriages are not a means of HIV prevention.<sup>448</sup> This is flawed and simply untrue—as monogamous relationships, irrespective of the sexual orientation of those taking part in them, function as

441. See *id.*

442. See *About Test Miami*, *supra* note 408; *HIV/AIDS Epidemiology Partnership 11a*, *supra* note 370.

443. See *About Test Miami*, *supra* note 408.

444. FLA. STAT. § 1003.46 (2015).

445. See *id.*; *supra* Section III.B.2 (discussing methods of prevention known to reduce HIV transmission that are not explicitly included in section 1003.46 of the Florida Statutes).

446. FLA. STAT. § 1003.46 (2015).

447. See *id.* § 1003.46(2)(a); *Today's HIV/AIDS Epidemic*, *supra* note 82 (noting that the Centers for Disease Control & Prevention reports that MSM constituted sixty-three percent of all new HIV infections in 2010).

448. FLA. STAT. § 1003.46 (2015). It specifically excludes monogamous same-sex marriages from its definition. *Id.*



a proper means of prevention for HIV transmission.<sup>449</sup> What is the purpose of having educational instruction meant to teach youth on HIV prevention if the state excludes disproportionately affected minorities from such instruction?<sup>450</sup>

The structure of section 1003.46 of the Florida Statutes is lacking in substance and should be amended to encompass all known facts on HIV transmission in a direct and explicit manner.<sup>451</sup> An example of a thorough educational structure for instruction on HIV/AIDS can be found in the California Education Code, reading as follows:

(a) A school district shall ensure that all pupils in grades [seven] to [twelve], inclusive, receive HIV/AIDS prevention education . . . . Each pupil shall receive this instruction at least once in junior high or middle school and at least once in high school. (b) HIV/AIDS prevention education . . . shall accurately reflect the latest information and recommendations from the United States Surgeon General, the federal Centers for Disease Control and Prevention, and the National Academy of Sciences . . . includ[ing] the following: (1) Information on the nature of HIV/AIDS and its effects on the human body; (2) [i]nformation on the manner in which HIV is and is not transmitted, including . . . on activities that present the highest risk of HIV infection; (3) [d]iscussion of methods to reduce the risk of HIV infection. This instruction shall emphasize that sexual abstinence, monogamy, the avoidance of multiple sexual partners, and abstinence from intravenous drug use are the most effective means for HIV/AIDS prevention, but shall also include statistics based upon the latest medical information citing the success and failure rates of condoms and other contraceptives in preventing sexually transmitted HIV infection, as well as information on other methods that may reduce the risk of HIV transmission from intravenous drug use; (4) [d]iscussion of the public health issues associated with HIV/AIDS; (5) [i]nformation on local resources for HIV testing and medical care; (6) [d]evelopment of refusal skills to assist pupils in overcoming peer pressure . . . ; (7) [d]iscussion about societal views on

449. See *Lower Your Sexual Risk of HIV*, AIDS.GOV, <http://www.aids.gov/hiv-aids-basics/prevention/reduce-your-risk/sexual-risk-factors> (last revised Aug. 13, 2015) (describing ways in which one can lower the risk of HIV transmission without limiting monogamy to male-female relationships). Also worth mentioning is that the Supreme Court has ruled that laws banning marriages between people of the same sex violates the United States Constitution. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015). From the words of the Court: "There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." *Id.* at 2599.

450. FLA. STAT. § 1003.46(2)(a) (2015).

451. See *id.*; *Lower Your Sexual Risk of HIV*, *supra* note 449.



HIV/AIDS, including stereotypes and myths regarding persons with HIV/AIDS. This instruction shall emphasize compassion for persons living with HIV/AIDS.<sup>452</sup>

As can be appreciated from California's analogous provision to section 1003.46 of the Florida Statutes, the language of the statute also emphasizes monogamy amongst other preventive measures against HIV transmission.<sup>453</sup> The statute directs school districts to take into account "recommendations from the United States Surgeon General, the federal Centers for Disease Control and Prevention, and the National Academy of Sciences," as well as requiring instruction on prevention methods, such as condom usage.<sup>454</sup> Florida's provision places a disproportionate emphasis on abstinence, and while abstinence is one method of prevention, it does not provide sexually active youth with the information needed to prevent them from contracting sexually transmitted infections.<sup>455</sup> Statistics indicate that teenagers are sexually active in Florida and that the abstinence education provided by the state is not lessening such activities.<sup>456</sup> Therefore, it is imperative to educate teenagers on effective prevention methods, including the proper use of condoms and other means that lessen HIV transmission—and that it be explicitly incorporated by statute in order to ensure the dissemination of such information.<sup>457</sup>

The provision in Florida is also written in terms of *may*, rather than *shall* as it is in California.<sup>458</sup> HIV prevention should not be a matter of *may* but should instead be a matter of *shall*.<sup>459</sup> HIV is a lifelong chronic condition that can kill its host if not properly treated.<sup>460</sup> It is a medical condition, and its prevention should be a state interest.<sup>461</sup> HIV is not a moral issue; HIV is a

452. CAL. EDUC. CODE § 51934 (West 2015).

453. *Id.* § 51934(b)(3); FLA. STAT. § 1003.46(2)(a) (2015).

454. CAL. EDUC. CODE § 51934(b)(3) (2015).

455. FLA. STAT. § 1003.46(2)(a)–(b) (2015).

456. Office of Adolescent Health, *Florida Adolescent Reproductive Health Facts*, U.S. DEP'T HEALTH & HUMAN SERVS., <http://www.hhs.gov/ash/oah/adolescent-health-topics/reproductive-health/states/pdfs/fl.pdf> (last updated Nov. 13, 2014).

457. *See id.*; *About Test Miami*, *supra* note 408; Steiner & DeCarlo, *supra* note 175.

458. *Compare* CAL. EDUC. CODE § 51934(a) (2015), *with* FLA. STAT. § 1003.46 (2015).

459. *See* CAL. EDUC. CODE § 51934(a) (2015).

460. *See Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS)* — United States, *supra* note 78; Dana P. Goldman et al., *supra* note 373; *supra* Section III.B.2 (discussing the scientific advances that have made HIV/AIDS a chronic condition as opposed to a fatal disease—albeit a serious one requiring medical attention).

461. *See Types of HIV/AIDS Antiretroviral Drugs*, *supra* note 146; *supra* Section III.B.2 (discussing the scientific advances that have made HIV/AIDS a chronic condition as opposed to a fatal disease—albeit a serious one requiring medical attention).



medical condition.<sup>462</sup> Therefore, the state should treat HIV as a medical condition and teach its students the correct information without withholding known methods of transmission, statistics, or an understanding of the scientific knowledge that we have acquired throughout the years about this epidemic.<sup>463</sup> The State of Florida should not shy away from the dissemination of information to its youth.<sup>464</sup>

b. *Accepting Responsibility for One's Actions*

As advanced by the ANAC, the HIV-specific criminal provisions scrutinized in the first half of this Comment “contradict public health messages regarding individual responsibility for safer sex, [and] do not alter behavior . . . .”<sup>465</sup> As such, the last recommendation of this Comment is that Florida implement educational methods on taking responsibility for safer sex practices.<sup>466</sup> The behavior of people living with HIV/AIDS may or may not lead to HIV status disclosure, and such reality may be due to a number of factors.<sup>467</sup> It is imperative that individuals take responsibility for their actions and that they not engage in sexual behavior that may exacerbate the spread of sexually transmissible diseases.<sup>468</sup>

In the absence of rape and infidelity, it is hard to conceive of scenarios where each sex partner is not equally responsible for safer sex practices.<sup>469</sup> Even in monogamous relationships, some sense of shared responsibility should exist, as public health experts suggest that everyone should take precaution against HIV transmission.<sup>470</sup> It is unjust to say that people living with HIV/AIDS are at total fault for HIV transmission where the other partner did not take precautions to reduce the possibility of

462. See Altman, *New Homosexual Disorder Worries Health Officials*, *supra* note 72; *Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS) — United States*, *supra* note 78; *supra* Section III.A (discussing the moral stigma that has surrounded this medical condition).

463. See *Types of HIV/AIDS Antiretroviral Drugs*, *supra* note 146; *supra* Section III.B.2 (discussing the methods of prevention against HIV transmission).

464. See CAL. EDUC. CODE § 51934 (2015).

465. See *Position Statement*, *supra* note 202.

466. *Id.*

467. See Buchanan, *supra* note 34, at 1256–62 (discussing the complex reasons on why PLWHA may fail to disclose their HIV status to a partner).

468. *Id.* at 1246 (noting that public health officials fear that HIV-specific criminal laws may foster a false sense of security in HIV-negative people).

469. See *id.* at 1254–55.

470. See Elliot, *supra* note 201, at 7 (recommending everyone to take precaution against HIV transmission and to not rely on the “false sense of security” the criminal law provides).



infection.<sup>471</sup> Merely pointing fingers at another and having that person prosecuted for engaging in sex acts hampers the public health interest in reducing stigma;<sup>472</sup> instead, we should be ensuring that PLWHA seek adequate health services and encouraging everyone to adopt a heightened sense of individual responsibility for safer sex practices.<sup>473</sup> Florida should recognize the concept of a shared responsibility in sexual practices in its public health campaign against HIV by explicitly incorporating it into section 381.0046 of the Florida Statutes and in school curriculums by explicitly incorporating it into section 1003.<sup>474</sup> Florida should also consider the concept of a shared responsibility in sexual practices when choosing either to amend or repeal its HIV-specific criminal provisions—as it is unjust for the law to punish those who have a communicable medical condition—while simultaneously turning a blind eye to the failure of those who do not carry such a medical condition in adequately preventing their exposure to the condition through their own volition.<sup>475</sup>

## V. CONCLUSION

The HIV/AIDS epidemic arose in a context of confusion and fear of infection that led to a quick stigmatization of the condition.<sup>476</sup> This in turn led to the passage of HIV-specific criminal laws throughout the nation in order to prevent the transmission of HIV.<sup>477</sup> Modern scientific advances in medicine have made HIV a chronic condition that may be prevented through the usage of proper prevention mechanisms known to date, inclusive of (1) safer sex practices, (2) ART, (3) Truvada as PrEP, (4) PeP, and (5) condoms.<sup>478</sup> Florida should either amend or repeal its HIV-specific criminal provisions in recognition of such scientific advances and recognize HIV/AIDS is no longer a death sentence.<sup>479</sup>

471. See *id.* at 11.

472. See Dodds & Keogh, *supra* note 227, at 316 (depicting the feelings of an HIV-positive woman regarding her thoughts on the subject of the collective responsibility that should be shared between sex partners regardless of HIV status—as part of a study aiming at understanding the effects of stigma on PLWHA).

473. See THE GLOB. COMM'N ON HIV & THE LAW, *supra* note 275 at 20 (noting that we should all carry a shared sense of moral responsibility in the fight against this condition).

474. See FLA. STAT. §§ 381.0046, 1003.46 (2015).

475. See FLA. STAT. § 384.34 (2015).

476. See Altman, *New Homosexual Disorder Worries Health Officials*, *supra* note 72; *supra* Section III.A.

477. See *supra* Part II.

478. See *supra* Section III.B.

479. See FLA. STAT. § 384.34 (2015); *supra* Section III.B, IV.A.



Florida suffers from a steady HIV transmission rate that is not decreasing.<sup>480</sup> The state's resources are better utilized in launching a more comprehensive public health campaign against HIV transmission than it currently has in place. San Francisco's *Getting to Zero* initiative can serve as an excellent model for reform in Florida.<sup>481</sup> Funding for such a comprehensive campaign is absolutely necessary.

The State of Florida must also change its message to its youth, who have seen a relative increase in HIV transmission rates in relation to other age groups in the last couple of years.<sup>482</sup> Comprehensive instruction on methods of HIV prevention with an emphasis on a shared responsibility for sexual practices is key to a reformed education system that will keep everyone up to date on the present reality of the HIV/AIDS epidemic.

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# INTRODUCTION

480. See *Epidemiology of HIV Infection Trends in Florida Reported Through 2014*, *supra* note 364; Bousquet & Auslen, *supra* note 383; *supra* Section IV.B.

481. See Buchbinder, *supra* note 386; *supra* Section IV.B.2.a.

482. See *supra* Section IV.B.3.